

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION

CONTROL OF ALCOHOL AND DRUG USE: PROPOSED APPLICATION
OF RANDOM TESTING AND OTHER REQUIREMENTS TO EMPLOYEES
OF A FOREIGN RAILROAD WHO ARE BASED OUTSIDE THE
UNITED STATES AND PERFORM TRAIN OR DISPATCHING SERVICE
IN THE UNITED STATES; REQUEST FOR COMMENT ON EVEN
BROADER APPLICATION OF RULES AND ON
IMPLEMENTATION ISSUES

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1120 Vermont Avenue, NW
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Federal Railroad Administration Panel

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1 P R O C E E D I N G S

2 9:08 a.m.

3 MR. COTHEN: Good morning.

4 This is a public hearing on Federal Railroad
5 Administration Notice of Proposed Rulemaking with
6 respect to the Application of 49 Code of Federal
7 Regulations Part 219, and that's our Regulations on
8 Control on the Use of Alcohol and Drugs in Railroad
9 Operations, and I believe everybody has had an
10 opportunity to review the Notice of Proposed
11 Rulemaking.

12 I am concerned that as a result, I believe,
13 of simple administrative difficulties in terms of the
14 volume of materials associated with the Department of
15 Transportation activities, as of yesterday evening, the
16 Regulatory Evaluation was not on our Electronic Docket
17 System, and I've noticed that several of the filings
18 that people have been so kind as to provide to us ahead
19 of time, and we really do appreciate that and want you
20 to know we try to read ahead and make these activities
21 as efficient as possible. Some of them had not yet had
22 the opportunity to get scanned in to the Docket.

23 So, as we go forward, we're going to need to
24 take that into consideration so that all parties have

1 an opportunity to view those documents and offer any
2 further thoughts that they may have, and any
3 suggestions you have about holding open the record of
4 the rulemaking during the proceeding, please feel free
5 to make those as we proceed with discussions.

6 The purpose of any public hearing on
7 regulatory matters is to receive information and views
8 of parties, so that the agency can make the best
9 possible decision, and hopefully we'll proceed in that
10 spirit today.

11 To get us started, let me make introductions
12 of the FRA Panel. Lamar Allen is FRA's Director of
13 Alcohol and Drug Programs. On my left, Brenda Mocosco
14 is an industry economist assigned to this proceeding,
15 and on my right is Patricia Sun, who's counsel for this
16 proceeding. We have others from FRA in the room. I
17 hope you'll get to know them at the break.

18 I'd also like to note the attendance at the
19 proceedings of Don Pensione and Peter Berkwhistle from
20 Transport Canada, who are seeing colleagues of ours
21 with whom we work on a regular basis, and we're glad
22 they're here to observe the proceedings.

23 Let me ask Patricia Sun to provide the legal
24 officer's statement at this point.

1 MS. SUN: Good morning.

2 I'm just going to read a brief statement on
3 the procedures that we will follow in today's hearing.

4 This is a hearing on FRA's Notice Proposing
5 Application of Random Testing and Other Requirements to
6 Employees of a Foreign Railroad Who Are Based Outside
7 the United States and Perform Train or Dispatching
8 Services in the United States.

9 The hearing will be conducted in accordance
10 with the Rules of Procedure of the Federal Railroad
11 Administration, which are published in the Code of
12 Federal Regulations at Title 49, Part 211.

13 This hearing will be informal. It will not
14 be an adversarial proceeding. Rules of Evidence will
15 not apply and cross examination will not be permitted.

16 In order for FRA to obtain the information
17 and expertise you bring to this hearing and to permit
18 each of you an equal opportunity to express your views
19 and comment on the subject matter, the procedures for
20 the hearing will be as follows.

21 Each person or organization wishing to make
22 an oral statement will be permitted to do so. At the
23 beginning of the statement, the witness should indicate
24 whether he or she is appearing in an individual or

1 representative capacity. Persons representing the same
2 organization may testify as a group.

3 Please spell your name and give your title
4 for the court reporter.

5 If you are testifying as a group, please
6 identify all members of your group at the beginning of
7 your presentation. If you will be referring to a
8 document today which has not yet been furnished to FRA,
9 please submit a copy to the Hearing Officer and to the
10 court reporter so that it may be marked for
11 identification and made a part of the public docket.

12 At the conclusion of the witness statement,
13 the hearing officer and the panel may question the
14 witness to clarify his or her testimony. At the
15 conclusion of all questions for a given witness, we
16 will move on to the next witness.

17 A transcript of today's proceeding is being
18 taken. We will not go off the record in this hearing,
19 unless so stated by the hearing officer. The
20 transcript is being prepared by a private non-
21 governmental reporting service under contract with FRA.

22 Persons desiring to purchase a copy should make their
23 own arrangements with the reporting service by speaking
24 to the reporter here today.

1 In addition, the original transcript will be
2 made a part of the public record of Docket Number FRA
3 2001-11068 and will be made available for inspection
4 during normal business hours in Room 7051 at 1120
5 Vermont Avenue, NW, Washington, D.C.

6 You may also obtain access to this docket on
7 the Internet at <http://dms.dot.gov>. All submissions to
8 the docket are also available for inspection and copies
9 may be obtained for a nominal fee.

10 Thank you.

11 MR. COTHEN: Thank you, Patricia.

12 I'd like to make a few opening remarks and
13 please just view these as advisory in the sense that it
14 may be of interest to you to know what some of the FRA
15 staff members here would like to get out of this
16 hearing, and there may be additional things that we
17 need to get out of this hearing that are totally not
18 within our contemplation. So, you go right ahead and
19 offer whatever information and views you think
20 appropriate.

21 Just as a little background, as the parties
22 have already pointed out in filings, the issue before
23 us today has been before the Federal Railroad
24 Administration in one way or another now since about

1 1986-1987, actually before that, in the memory of those
2 of us who were involved at the time.

3 We have always wished to have compatible and
4 harmonious regulations in cooperation with neighboring
5 countries, and particularly because of the active
6 commerce involved and the similarity of many of our
7 regulatory programs with the Government of Canada,
8 discussions have transpired at various levels in
9 various forums for many years.

10 Our conversations with Transport Canada, the
11 responsible regulatory body in Canada, on this and
12 other issues has been recurring, and in fact, our
13 governments cooperate on a broad range of issues in a
14 very detailed way in many cases, and we seek to learn
15 from the Canadian experience and try to offer any
16 insights that we can from any of the mistakes that
17 we've committed along the way.

18 Where we left this last was that we thought
19 it was appropriate, notwithstanding the lack of final
20 resolution of alcohol and drug policy in transportation
21 in Canada, to leave a limited exception in place, and
22 you see that, the result of that in the regulation that
23 the agency has proposed to amend at this time.

24 Since that time, the Federal Highway

1 Administration has taken a different course under the
2 General Policy Guidance, the Office of the Secretary of
3 Transportation, with respect to international trucking
4 operations.

5 Another development that has occurred more
6 recently has been the adoption by Transport Canada of
7 medical qualification requirements; in essence,
8 federalizing in Canada the programs that North American
9 railroads operating in Canada have had in place for
10 some time and regularizing those programs and carrying
11 them forward.

12 So, we have what we believe to be a fairly
13 settled environment with regard to Canadian policy on
14 alcohol and drugs and transportation. For many years,
15 when we inquired, we were always told that the Human
16 Rights Commission was expected to issue another ruling
17 or that an arbitration award was pending, and those,
18 you know, tend to be the answers, whether you're
19 inquiring in the '80s or the '90s or in the current
20 decade, and I think at some point, one must assume that
21 policy is relatively settled, and then it becomes time
22 to review the compatibility of standards, and we do so
23 today principally with respect to personnel who are
24 actually physically operating on highways of interstate

1 in foreign commerce in the United States of America.

2 That is our principal focus. We raised some
3 other issues in the Preamble. Some of you have seen
4 fit to address those in the comments. We appreciate
5 that. The principal focus today would be in terms of
6 our interest in gaining testimony with the issue of
7 train engine crews on U.S. soil.

8 As commenters have already noted, the
9 availability of NAFTA mechanisms for consultation.
10 We've used those in the past. There's no reason why we
11 can't use them again. If the record of this proceeding
12 indicates the need for further consultations through
13 that mechanism or otherwise, we will.

14 In the past, the Land Standards Committee of
15 NAFTA has indicated that direct consultations between
16 Federal Railroad Administration and Transport Canada
17 are perhaps the best way of developing these kinds of
18 issues, and since the same personnel generally sit,
19 regardless of the particular forum officially that's
20 being constituted, we certainly take that as
21 representing an opportunity to discuss matters, either
22 under formal NAFTA framework, if appropriate, or
23 through direct consultation with our colleagues in
24 Transport Canada, as may seem most appropriate to the

1 Governments involved at the time.

2 So, we're not presenting an either/or
3 proposition here, but we do want to gain more
4 information on the specific proposal before us which
5 may be of use certainly to our Government, perhaps to
6 the Canadian Government as well.

7 I think it's important to note at the outset
8 that as we understand the policies and regulations and
9 implementations in the two countries, that there is a
10 somewhat fundamental difference at the outset between
11 the approaches in Canada and the United States with
12 respect to drugs other than alcohol, and I may be
13 disabused of this by testimony received today or by
14 further information that we get from our colleagues in
15 Transport Canada.

16 In the United States, a rather clear policy
17 decision was made that with regard to illegal drugs,
18 such as cocaine, marijuana, PCP, bencyclidine, for
19 which there are limited, if any, available medical
20 uses, that use of these drugs at any time would not be
21 deemed appropriate, and with respect to other
22 controlled substances, use of those drugs at any time
23 would not be appropriate, except under the narrow
24 exception for medical use under the supervision of an

1 appropriate medical practitioner.

2 Canadian policy appears on the face of what
3 we've looked at to be more employment-centered in the
4 sense of asking whether or not individuals are subject
5 to the immediate effects of the substances at the time
6 that they are on the property or engaged in their
7 safety-sensitive duties.

8 Conceptually, and again I'm processing this,
9 and if I'm correct, you can disabuse me of it, and we
10 will have learned more today, we found difficulty with
11 application of that policy when the Department of
12 Transportation regulations were created for a number of
13 reasons.

14 One of the practical reasons is policing of
15 substance abuse in a typical and efficient way of
16 identifying persons who are using illegal substances or
17 improperly using substances that might have medical
18 uses is a drug urinalysis, which is, of course, notably
19 ambiguous on the issue of recency of use or impairment
20 at the time.

21 Secondly, and actually more importantly, one
22 need not be under the acute effects of a drug in order
23 for one's performance to be degraded. There's some
24 medical scientific evidence that chronic use of

1 marijuana can have deleterious effects, and there's
2 certainly ample evidence that use of stimulants can
3 have later effects, similar to the problems with severe
4 abuse of alcohol in terms of a falling off of
5 performance and after-effects of the substance. That's
6 also true of narcotics, by the way.

7 So, we've taken a somewhat different
8 approach. I'm not going to argue that one system is
9 better than another system here. That's not the
10 purpose, just simply to point out the differences in
11 approach and that may bear on both the -- on how we
12 should view the matter, and it certainly places the
13 issue of random drug testing in a different light,
14 depending upon whether one is a step north or a step
15 south of an international border.

16 So, any ideas or thoughts you have on that
17 would be appreciated.

18 The second point, that in adopting U.S.
19 standards, we considered the medical model and noted
20 its benefits and limitations and elected not to rely
21 exclusively on the medical model for handling substance
22 abuse problems.

23 What we found consistently, even after
24 adoption of FRA Drug and Alcohol Standards, was that

1 while the medical model is not only a good but perhaps
2 the exclusive way of addressing individuals with
3 identified chronic chemical dependencies, once they are
4 identified, that in U.S. practice at least, it has been
5 notably unsuccessful in identifying those problems at
6 the outset.

7 Advances in medical science and approach and
8 strategies employed elsewhere perhaps could be more
9 successful. We don't know that. We're speaking from
10 our experience. We also found repeatedly that
11 inappropriately and unintentionally in some cases,
12 medical approaches to handling individuals who had been
13 identified with substance abuse disorders tended to
14 enable behavior.

15 We found people who had cycled two, three,
16 four times through treatment programs, and while we
17 have always endorsed and encouraged and, I think, have
18 been leaders as an agency in promoting employee
19 assistance programs, Operation Red Block and other peer
20 programs, we also have noted the importance of
21 accountability in the end to ensure that folks realize
22 the consequences of their action and that there has to
23 be a point at which public safety and the safety of co-
24 workers is elevated above the attempt to salvage the

1 individual who is engaging in the abusive behavior.

2 That is a concern because commenters in this
3 proceeding have raised the issue of the Canadian
4 Disability Statute. In the United States, our Congress
5 exempted drug abuse from the Americans With
6 Disabilities Act, and the application to alcohol abuse
7 has been, I would say, progressive with regard to
8 accountability for those involved in transportation,
9 safety-sensitive transportation, and other safety-
10 sensitive and security-related functions, again
11 establishing accountability as well as trying to help
12 individuals.

13 So, kind of help us understand. That's our
14 perspective and point of view in terms of the history
15 of the program here, help us understand how the same
16 kinds of issues are handled in the Canadian context.

17 Also help us understand issues related to
18 difficulty of implementation, if you would. We are
19 talking about short runs across an international
20 border, approvals and extra boards, as the comments
21 have already indicated to us, that may be larger than
22 certainly the number of any daily assignments that
23 venture across the border.

24 Finally, we can certainly talk about cost

1 benefit issues today. I will say that the commenters
2 are on thin ice when they take U.S. experience, which
3 is heavily colored by the existence of random testing
4 programs, to extrapolate that to the situation in which
5 the subject population is not subject to random
6 testing. We did find that random testing had a
7 material effect across transportation on substance
8 abuse among the population affected, and so that's not
9 quite the way we would structure our economic analysis
10 here at FRA.

11 We're still interested in hearing about those
12 issues, and we do understand that there are issues
13 related to complications involving Canadian labor law
14 and other Canadian statutes that we need to take into
15 consideration.

16 We have also, throughout this effort,
17 maintained an active dialogue with authorities in
18 Mexico. I should indicate that at various points, it's
19 been indicated to us that Mexican authorities intended
20 to adopt compatible alcohol and drug use regulations.
21 I'm not personally aware of the status of that effort.

22 If anyone here is, they can certainly add that to the
23 record.

24 The principal reason, I think, that the focus

1 of filings thus far has been on our northern border is
2 that on the southern border, generally speaking, the
3 operations stop at the border and a turn-over is made
4 of the equipment to U.S. crews. That probably won't be
5 the case forever, and this proceeding presents issues
6 therefore that are just as relevant potentially to the
7 southern border operations as Canadian operations. We
8 simply have no experience with it at this point.

9 So, I'm sure I've said quite enough at this
10 point, and we need to get on with the witnesses, and I
11 would ask Canadian National representatives if you
12 could come forward, please. Karen Phillips and Don
13 Watts. Don's going to come.

14 MR. WATTS: Just me.

15 MR. COTHEN: Okay. Don, if you could -- and
16 this will be true, as I think Patty indicated, for all
17 the witnesses, if you could state in your own voice, so
18 that we have it for the record, real clearly your name
19 and your title and affiliation, we'd appreciate it.

20 MR. WATTS: I have three copies of the
21 submission. Do you want all three or do I give one to
22 the --

23 MR. COTHEN: We'll take those and get one in
24 the docket. Thank you.

1 Statement of Don Watts
2 Canadian National Railroad

3 MR. WATTS: Good morning. My name is Don
4 Watts. The first name is Don, D-O-N, last name Watts,
5 W-A-T-T-S. I'm Director of Regulatory Affairs for
6 Canadian National Railway located in Montreal, Quebec,
7 Canada.

8 On behalf of CN, I wish to provide you with
9 our comments on the Notice of Proposed Rulemaking and
10 the Request for Comments that was published in the
11 December 11th, 2001, Federal Register. I should also
12 mention that CN has provided a detailed written
13 submission that was sent late last week, and it will
14 largely echo the views that I'll be expressing today.

15 CN is North America's fifth largest railroad.
16 It operates the largest network in Canada and the only
17 transcontinental network in North America. We have
18 operations in eight Canadian provinces and 14 U.S.
19 states.

20 In 1999, CN carried out an extremely
21 successful integration with the Illinois Central which,
22 incidentally, included the consolidation of our drug
23 and alcohol programs for all of our U.S. operations
24 under Haley Berhove IC.

1 We are, of course, currently implementing a
2 similar integration with the Wisconsin Central.

3 Safety is a core value at CN, and the
4 railroad has long been recognized as one of the safest
5 railroads in North America. CN believes that an
6 important part of an effective safety program is a
7 drug- and alcohol-free work place.

8 As such, we are in favor of random drug and
9 alcohol testing for safety-critical positions on both
10 sides of the border and have long advocated common drug
11 and alcohol testing regulation from Transport Canada
12 and the FRA. It is felt that such a measure will
13 improve the overall safety of operations while reducing
14 the inevitable human rights and jurisdictional
15 challenges as well as the related economic impact on
16 the railroad that would be associated with applying
17 unilateral U.S. regulation to Canadian-based employees.

18 There are currently nine locations where CN
19 has Canadian-based train crews operating into the U.S.

20 These range from one mile to 77.7 miles and include
21 operations over a total of 204 miles of track in the
22 U.S. On the back page of the submission I made today,
23 there's a detailed list of the nine locations, so I
24 won't repeat them all right now.

1 Although drug and alcohol testing is not
2 legislated in Canada, CN has been conducting testing
3 under company policies since 1986. In 1997, as part of
4 a major overall of our safety programs, we implemented
5 a comprehensive drug and alcohol policy and program for
6 our Canadian operations. This consolidated a number of
7 existing programs to provide an extensive and clearly-
8 defined program and includes testing for pre-employment
9 to specified risk-sensitive positions, pre-assignment
10 to risk-sensitive positions, reasonable cause and
11 return-to-service or follow-up; in other words, post-
12 treatment.

13 Revisions to the policy plan for this year,
14 2002, will add mandatory post-accident testing using
15 criteria identical to that of the FRA.

16 CN's Canadian drug and alcohol program also
17 provides for employee self-referral and co-worker
18 report programs that are similar to those that would be
19 required under the expanded scope of Part 219 as
20 proposed in the Notice.

21 Of significance, however, is that the CN
22 policy for Canadian operations does not include random
23 testing. This is entirely due to the Canadian legal
24 climate and specifically the Canadian Human Rights Act

1 which has in the past ruled that company-mandated
2 random drug testing is prohibited even for safety-
3 sensitive positions.

4 Furthermore, random drug testing has been
5 historically prohibited under Canadian Railway Labor
6 Arbitration Jurisprudence. Now, although this may have
7 been somewhat modified by a recent Ontario Court of
8 Appeals decision, it has certainly not been tested in
9 the railway context and there clearly remains
10 considerable uncertainty regarding the legal status of
11 random drug and alcohol testing in Canada.

12 As recently as 1999, CN hosted
13 representatives from both FRA and Transport Canada to
14 discuss CN's drug and alcohol policy and our associated
15 programs for Canadian-based employees. At that time,
16 we explained in great detail the Canadian regulatory
17 history with regards to drug and alcohol testing as
18 well as all aspects of our CN policy.

19 We emphasized that the existing combination
20 of FRA testing requirements and the lack of Canadian
21 legislation has led to uncertainty and ambiguity that
22 have resulted in increased costs to the railway
23 industry and labor. It's also created a situation
24 where employees often receive contradictory

1 instructions from railroad companies and the unions.

2 We concluded the 1999 session by adding that
3 while we feel our policy has made a difference, we
4 strongly believe that there's still need for random
5 testing for all safety-critical employees in our
6 Canadian operation. We added, however, that under the
7 current Human Rights legislation, expanding random
8 testing in Canada can best be done if Transport Canada
9 enacts similar legislation to that in place under FRA
10 in the United States, and clearly this remains our
11 position.

12 As such, while CN generally supports the
13 expansion of random testing as contained in the Notice,
14 we are extremely concerned that it will be difficult
15 and potentially very costly to successfully implement
16 within the boundaries of Canadian Human Rights
17 legislation, unless accompanied by comparable
18 legislation from Transport Canada for all safety-
19 critical positions in Canada.

20 Now, FRA has been aware of this dilemma
21 arising from the inconsistency with Canadian law for a
22 number of years. I know since 1989, as was mentioned
23 earlier, there have been a series of delays in
24 implementing the random testing aspects of Part 219 for

1 foreign-based employees, so as to allow for discussion
2 with Canadian regulatory agencies, and it's our under-
3 standing that similar discussions have most recently
4 been held between FRA and Transport Canada as part of
5 the Canada-U.S. Land Transportation Standards Committee
6 under NAFTA.

7 Due to the nature of train crew collective
8 agreements and railroad operations, it's important to
9 note that for CN to implement random testing for those
10 covered employees who operate in the U.S., we would
11 need to create a random pool which includes many
12 employees who are subject to but may never actually
13 operate into the U.S. This will undoubtedly create
14 problems under the Canadian Human Rights legislation.

15 Although Human Rights decisions pertaining to
16 similar drug testing requirements for cross-border
17 truck and bus drivers have helped clarify the situation
18 somewhat, it remains without comparable Canadian
19 legislation, we would be in the extremely difficult
20 position of having to balance the requirements
21 necessary to fully comply with the FRA regulation
22 against the very strict requirements that will be
23 needed to satisfy the Canadian Human Rights Commission.

24 We're also concerned that it could lead to

1 the possibility of Canadian train crews refusing to be
2 tested and having to be taken out of service, thus
3 potentially tying up cross-border traffic and
4 international trade, and it's important to note that
5 many of the CN operations which involve Canadian crews,
6 Canadian-based crews, there may not be sufficient
7 infrastructure or resources to support alternatives
8 which use U.S.-based crews.

9 In any event, CN will undoubtedly be forced
10 to incur considerable expense in defending Human Rights
11 challenges. This problem will be even more acute with
12 respect to Canadian-based dispatchers who do not
13 actually physically set foot in the U.S. and therefore
14 could claim additional protection under international
15 law as it pertains to the extent of jurisdiction.

16 For these reasons, again we support the
17 general intent of expanding random testing, but we
18 strongly urge FRA to continue to work with their
19 Canadian counterparts to develop common drug and
20 alcohol legislation. Such would greatly reduce the
21 potential costs in human rights jurisdictional
22 challenges while improving the safety of operations,
23 and we feel it would be very consistent with the goals
24 of NAFTA and the Canadian-U.S. Land Transportation

1 Standards Subcommittee.

2 In our formal submission, our written
3 submission that we sent last week, we made detailed
4 comments on a number of other specific items in the
5 Notice and the supporting economic analysis. I won't
6 repeat them all in my statement today. However, I do
7 wish to focus on a couple of items, including those for
8 which the FRA specifically had solicited comments.

9 Starting with Extraterritorial Dispatching.
10 In the Notice, FRA requests comments on the possible
11 expansion of Part 219 to foreign-based dispatchers who
12 control track located in the U.S., and, of course,
13 there was a hearing on similar aspects on Tuesday which
14 we appeared at.

15 As previously stated, CN supports the general
16 concept of random testing for train dispatchers.
17 However, as previously noted, it is our view that
18 application of such a requirement for employees who do
19 not actually set foot in the U.S. will be extremely
20 contentious from both the standpoint of human rights
21 and territorial jurisdiction under international law.

22 As such, we believe that this specific issue
23 must be discussed in great depth with Transport Canada,
24 and we would strongly recommend the two agencies

1 resolve the matter through the application of common
2 drug and alcohol testing requirement for train
3 dispatchers.

4 We also note that despite comments in the
5 Introduction to the NPRM, which suggests that train
6 dispatchers would remain exempt from the full
7 provisions of Part 219, there does not appear to be any
8 specific wording in the actual regulation to
9 accommodate this.

10 Another issue is with regards to handling of
11 foreign-based signal maintainers where FRA asked for
12 comments concerning the expansion of Part 219 to
13 foreign-based signal maintainers who may be required to
14 perform work in the U.S.

15 CN wishes to advise the panel that the use of
16 its Canadian-based signal maintainers to maintain
17 systems in the U.S. is indeed very occasional and in
18 fact even less than that stated in the Notice. CN only
19 has signal maintainers located in Southern Ontario who
20 occasionally are required to work into the U.S., into
21 Buffalo, New York, or Black Rock area. As such, CN
22 agrees that these employees should remain exempt from
23 the requirements of Part 219.

24 To this point, we also note that such

1 positions would not be considered as safety-critical
2 under the Canadian Railway Safety Act and thus would
3 not be subject to Canadian testing regulation, even if
4 adopted.

5 It should be noted, however, that CN will
6 continue to apply all testing aspects of our own
7 internal Canadian drug and alcohol policy to these
8 employees.

9 Expansion of post-accident testing. In the
10 Notice, FRA also requests comments on expanding the
11 requirements for post-accident testing to perhaps
12 include foreign railway foreign-based employees who are
13 involved in an otherwise-qualifying event while in
14 transit to or from the U.S.

15 Although CN supports post-accident testing,
16 it is our view that such an expansion would be very
17 difficult to defend from the standpoint of
18 international law and territorial jurisdiction. Also,
19 it's important to note that in the case of fatalities,
20 there could be significant jurisdictional issues
21 pertaining to FRA's requirements for handling of tissue
22 specimens and the Canadian Provincial Coroner's powers.

23 As previously mentioned, we, CN, are
24 expanding our Canadian drug and alcohol testing policy

1 to include post-accident testing using FRA criteria.
2 It's our view that this will adequately address this
3 issue.

4 And finally, FRA asked for comments on
5 whether there would likely be problems with the
6 shipping of specimens from Canada to FRA-designated
7 post-accident labs in the U.S. when additional testing
8 beyond that in Part 40 is deemed necessary.

9 In reviewing this issue, we, CN, acknowledge
10 that there could very well be delays in shipping due to
11 Customs issues, etc. It's therefore suggested that the
12 most effective means of addressing these issues would
13 be to certify one or more Canadian laboratories to be
14 able to perform the required analysis. This should not
15 be difficult in light of the high level of technical
16 sophistication at many Canadian labs.

17 At this point, I'd also like to comment on a
18 couple of issues and concerns that we have with regards
19 to the regulatory evaluation and the associated
20 Economic Evaluation that was prepared by FRA.

21 The FRA's Economic Evaluation is based on a
22 total of 170 Canadian-based train crew employees
23 operating into the U.S. Although we don't have data
24 for other affected Canadian railways, CN alone has

1 identified a 140, approximately a 140 Canadian-based
2 train crew employees at CN alone that are in pools that
3 regularly operate into the U.S.

4 If we add those spare board employees that
5 can occasionally work into the U.S., the overall number
6 for CN would be on the order of 400. In either case,
7 the number used by FRA to develop the cost of the rule
8 would seem to be considerably under-estimated.

9 In the same section, FRA also suggests, and
10 I'll quote at this point, "As a result of the
11 requirements of the proposed rule, foreign railroads
12 may decrease the number of train employees that operate
13 in the United States to the minimum number required to
14 perform the operations under ideal conditions and
15 accept the risk of delay associated with not having
16 some reserve engineers and other train crew members
17 available."

18 CN strongly believes that this would not be a
19 viable option. Our customers demand on-time service,
20 and we've been able to succeed by providing that level
21 of service. CN's much-documented scheduled railroad
22 and associated asset utilization philosophies are based
23 on providing consistent performance. Clearly, we
24 cannot accept a risk of delay due to not having

1 sufficient train crews cleared for operation in the
2 U.S.

3 An inaccuracy with regards to pre-employment
4 testing is also noted in Section 11 of the document
5 which states, in part, "Only one Canadian carrier is
6 currently performing pre-employment drug testing."
7 Although FRA does not indicate which carrier they're
8 referring to, the statement is clearly incorrect as CN
9 is aware of at least two Canadian railroads, those
10 being CN and CP, that do not conduct pre-employment
11 testing.

12 Also in the section of the document that
13 deals with identification of troubled employees, FRA
14 states that "employees who either refer themselves or
15 are reported by co-workers will take a leave of absence
16 to receive treatment and once rehabilitated will return
17 to service on the recommendation of an SAP."

18 It should be noted that for Canadian-based
19 employees, under Canada's new Medical Rule regulations,
20 the railroad's chief medical officer would also have to
21 approve any return-to-service. Due to such and also
22 due to minor differences between CN's peer-reporting
23 program and FRA requirements, it's also likely that
24 contrary to the assumption made in the economic

1 document, CN would likely have to file an alternate
2 policy in this regard.

3 CN also believes that a number of the cost
4 components associated with the new requirements would
5 seem to be substantially under-estimated. For
6 instance, at one point, FRA estimates that development
7 and submission of a test program as required under Part
8 219 would take only one hour. This would seem to be an
9 extremely optimistic estimate. CN suggests it would
10 most likely take in the order of eight to 24 hours to
11 complete.

12 We also note that the analysis does not
13 account for a number of additional costs that would be
14 incurred by railroads, such as CN. For instance, under
15 Canadian law, drug or alcohol disorders are deemed to
16 be disabilities. As such, a Canadian railroad must
17 accommodate such employees to the extent possible.
18 This will add additional costs to the railroads.

19 In addition, the combination of FRA
20 regulations and the Canadian Railway Medical Rule
21 requirements would add an additional cost when
22 Canadian-based crews test positive for FRA drug or
23 alcohol tests.

24 As previously mentioned, under Canadian

1 regulations, the railroad's chief medical officer has
2 the ultimate decision with regard to the fitness-for-
3 duty. Thus, in addition to the requirements associated
4 with the SAP under FRA regulation, Canadian railroads
5 would have the additional cost associated with the CMOU
6 review of the fitness-for-duty of all employees who
7 either test positive or diagnosed as having a disorder.

8 With respect to costs associated with
9 employees on leave of absence, CN also notes that under
10 the Railroad's Benefits Program, we would be required
11 to pay sick leave benefits to such employees. CN would
12 also be required to pay part of the rehabilitation
13 costs. Both of these would be a cost, in addition to
14 those estimated by FRA.

15 And of most significance by far, with respect
16 to the estimated cost to Canadian railroads as
17 contained in the Notice and the Economic Evaluation, is
18 the complete omission of any mention at all of the
19 costs that CN and other affected Canadian railroads
20 would undoubtedly be forced to incur in defending human
21 rights challenges, unless comparable Transport Canada
22 regulation is enacted.

23 Similarly, there's no reference at all to
24 potential costs associated with train delays,

1 operational changes or cross-border trade disruptions
2 due to refusals to submit to random testing, and as
3 previously noted, these by far are the major concerns
4 we have with the proposed rule.

5 In conclusion, we repeat that CN generally
6 supports the expansion of random drug and alcohol
7 testing for safety-critical employees on both sides of
8 the border, but we strongly urge FRA to continue to
9 work with their Canadian counterparts to develop a
10 common drug and alcohol regulation for railroad
11 operations in the two countries.

12 We feel that such a measure would reduce the
13 inevitable human rights jurisdictional challenges and
14 related economic impact on the railroad associated with
15 applying U.S. regulation to Canadian-based employees
16 while improving the overall safety of operations and
17 furthering the goals of NAFTA and the Canada-U.S. Land
18 Transportation Standards Subcommittee.

19 I want to thank you very much for providing
20 us with the opportunity to bring forward these comments
21 and concerns.

22 MR. COTHEN: Thanks very much, Mr. Watts.

23 Questions from the panel? Ms. Mocosso?

24 MS. MOCOSO: Hi. You mentioned that you

1 would be testing a total of approximately 400
2 employees, including extra boards?

3 MR. WATTS: Therein lies the problem.
4 There's at least a 140, I believe I said, that
5 guaranteed would have to be in the pool. The problem
6 then is you have another 200 and whatever, 260 that are
7 subject to -- are on board that are subject to
8 operation in the U.S., and therefore we -- the easiest
9 thing is to put them all in the pool, but by far, that
10 would not be allowed under the Canadian Human Rights
11 challenge.

12 So, as a result, we have this very difficult
13 balancing situation where we'd have to provide a pool
14 that fully meets the FRA requirements and at the same
15 time is in compliance with the Canadian Human Rights
16 laws. So, there's a bit of a balancing act, and the
17 pool would be somewhere between a 140 and 400. That's
18 just in Canada alone.

19 MS. MOCOSO: Over the next 20 years, would
20 you expect for the size of the 140-employee pool to
21 grow?

22 MR. WATTS: Over the next how long?

23 MS. MOCOSO: Like the next 20 years or so.
24 What growth rate would you expect, if any?

1 MR. WATTS: It's always impossible to predict
2 what operations are going to happen in the future, but
3 I wouldn't see it changing. At this point in time, I
4 wouldn't see it changing.

5 MS. MOCOSO: Thank you.

6 MR. COTHEN: Mr. Allen?

7 MR. ALLEN: Do you think the changes to the
8 medical that we've heard about and read about in front
9 of your submissions here is going to change your
10 opinion of the need for the random testing to improve
11 your program?

12 MR. WATTS: The Medical Rule and certainly
13 the role of the Chief Medical Officer and personal
14 physicians as they pertain to drug and alcohol is
15 definitely an important part of the drug-free work
16 place.

17 We see it as being -- if you take a look at
18 an entire solution, if you will, or part of the puzzle,
19 it's a key component of the puzzle, but it's not the
20 entire solution, and as a corporation, we would still
21 support and we do still support random testing for our
22 operations in both Canada and the U.S. as the missing
23 link, if you will.

24 MR. ALLEN: Okay. Thank you.

1 With regards to your discussion about our
2 questions on post-accident testing in Canada of crews,
3 either coming into the United States or just leaving
4 the United States, can you -- you mentioned that you
5 are changing your post-accident policy rules to mirror
6 the requirements in our Subpart C of 219.

7 Can you discuss that a little bit as to how
8 you plan to do that?

9 MR. WATTS: We have a policy, again there's
10 no legislation in Canada, we have a policy for CN
11 operations in Canada that currently has a number of
12 tests, including cause testing, but not mandatory post-
13 accident testing.

14 What we plan on adding to that package is
15 post-accident testing that is identical to that in the
16 U.S. So, it would be using the same conditions, the
17 same dollar thresholds and the same triggers, such as
18 evacuation and fatalities and such that would be --
19 that are in place right now in the U.S.

20 MR. ALLEN: Do you plan on mirroring the
21 methodology that we use also of blood, urine, tissue,
22 and sending them to a qualified laboratory to review
23 those specimens for the same regimen that we do?

24 MR. WATTS: I'm not a hundred percent sure,

1 to tell you the truth. I'm not on the Medical Group
2 that's working on that. I don't know that we're going
3 to go as far in terms of the blood and tissue aspects.
4 It may just be urine testing, but again I'm not sure.
5 I could find that out for you.

6 MR. ALLEN: I would appreciate that.

7 In coordinating with my counterpart in FHWA,
8 I am checking with them. They have chosen in their
9 regulation and their subsequent guidance to do post-
10 accident testing in Canada on the two trips that I just
11 mentioned. The crew that goes into Canada, they are
12 subject to post-accident testing under U.S. Federal
13 Highway rules, until they get to their first terminal,
14 and they also are subject to testing coming into the
15 United States from their last terminal to the border
16 coming into the United States. They say that they have
17 not experienced any problems.

18 I was just wondering. I don't really know
19 your structure that well. Do you participate in that
20 particular program with any trucking that you may have?

21 MR. WATTS: We have some engineering vehicles
22 that may cross into the U.S., and I know are subject to
23 the pools. I don't -- so, therefore, we'd be subject
24 to those requirements as well.

1 There's so few that we have in that group,
2 that I'm not sure that they haven't been involved in
3 any of the accidents that would have triggered that
4 particular requirement.

5 MR. ALLEN: Thank you very much.

6 MR. COTHEN: Ms. Sun?

7 MS. SUN: Mr. Watts, you mentioned earlier
8 that CN had some other written comments that they had
9 submitted?

10 MR. WATTS: Hm-hmm.

11 MS. SUN: I'm not aware of any being in our
12 docket.

13 MR. WATTS: I have copies of them here that I
14 can provide you. I know we faxed or we couriered down
15 comments on both this hearing as well as the
16 Extraterritorial, and the Extraterritorial arrived
17 because they were referred to in the hearing there on
18 Tuesday.

19 But I have a copy that I can provide you in
20 my briefcase over there.

21 MS. SUN: Okay. Thank you.

22 MR. WATTS: I brought an extra copy just in
23 case. They may have gotten mixed up, and they may be
24 sitting in the docket for the other day.

1 MS. SUN: It's possible.

2 MR. WATTS: They may have come in the same
3 envelope.

4 MS. SUN: Yes. Could you provide, also, a
5 supplement for our benefit to the record about your
6 plans to develop your own post-accident testing
7 program?

8 MR. WATTS: Sure.

9 MS. SUN: We'd like to know the details, such
10 as when you plan to implement, if you have a lab in
11 mind for your post-accident testing, would you be
12 testing for the same substances that the FRA program
13 tests for?

14 MR. WATTS: I will do that, yes, next week.

15 MS. SUN: You had mentioned that some of the
16 differences between the Canadian -- your
17 responsibility, peer-reporting program and FRA's
18 employee/co-worker reporting or voluntary referral
19 programs would lead to cost differences.

20 Could you explain a little bit more about
21 your peer-reporting program?

22 MR. WATTS: The major difference as it
23 pertains to cost differences is just the fact that you
24 would have -- under the Canadian policy, primarily

1 because of the change in Medical Rule, you would have
2 the additional requirement of an SAP review to satisfy
3 FRA requirements, plus a CMO, Chief Medical Officer,
4 review to satisfy the Canadian requirements and that's
5 really -- as far as the cost component is concerned,
6 that's really the difference.

7 There's also some minor differences in terms
8 of testing situations when you have a co-worker report
9 and some of the specific follow-up aspects that are,
10 I'm told, different enough from what FRA has, although
11 they may be minor, would require us to submit an
12 alternate policy to FRA.

13 MS. SUN: Could you also explain a little
14 more about what the new Medical Rule regulations are
15 that you were referring to?

16 MR. WATTS: Yes. The new Medical Rule is a
17 rule that came into effect last November for all
18 safety-critical positions in Canada which would be for
19 train crews as well as train dispatchers, and what they
20 require in a nutshell is that every three to five
21 years, depending on the age of the individual, the
22 person must undergo a full medical assessment and that
23 medical assessment includes hearing, vision, as well as
24 a number of other potential situations, epilepsy,

1 diabetes, cardiovascular situations, and drug and
2 alcohol is one of them.

3 There's actually a brochure there that Lamar
4 Allen is looking at right now that was produced for the
5 medical community in Canada and distributed through the
6 Canadian Medical Association to all physicians in
7 Canada that outlines how it works.

8 A couple of the key components in there is
9 that there are guidelines for all of these individual
10 aspects, all these individual conditions. There's
11 guidelines that were produced especially for this
12 program by known experts in the field.

13 For instance, we had a vision expert produce
14 the vision guideline, and they're tailored to the
15 railway environment to the maximum degree possible, and
16 there's guidelines that have been set out to indicate
17 for a railroad employee what sort of conditions we
18 should be aware of and which sort of conditions could
19 affect performance.

20 One of the other important aspects of the
21 Canadian Medical Rule is that under the Canadian
22 Railway Safety Act, a physician who is -- a person --
23 first of all, a person in a critical -- a safety-
24 critical position, whenever they go to a doctor or an

1 optometrist, must tell the doctor or optometrist that
2 they are a safety-critical position under Canada's
3 Railway Act, and the doctor, if they have any concerns
4 over the condition of that patient, are required to
5 report the concerns to the company's chief medical
6 officer.

7 MR. ALLEN: If I could jump in on a little
8 bit of that for clarification, if I could?

9 I'm looking at the brochure here, and I don't
10 see substance abuse mentioned one time in it, and even
11 more important to me is, this is the guideline going
12 out to all the physicians out there, and you mentioned
13 the guides that are available for the different
14 components. I also noticed the absence of anything on
15 substance abuse evaluation.

16 Just as a part of the record here, that is
17 similar, I'll submit that that's the same situation we
18 found in the U.S. over the years, is that usually a
19 substance abuse evaluation goes to the bottom of an
20 evaluation of medical fit-for-duty in a medical
21 setting, and doctors have always, I have found, been
22 very hesitant to bring that up.

23 With regards to the rule about the individual
24 self-identifying to the doctor that they are in the

1 rail industry and they're safety-sensitive-critical,
2 what mechanism do you -- is being applied to check that
3 that happens? Is there a check and balance of that,
4 that it actually does happen?

5 MR. WATTS: There's a couple of issues.
6 First, with regards to the brochure, I do want to
7 mention that the -- on the list you're referring to is
8 a list of standards that are currently out there for
9 use by the medical community, that it is correct that
10 there is not a drug and alcohol one out there right
11 now.

12 The drug and alcohol standard is on the list
13 there and is being worked on right now, but it is not
14 one of the completed ones, which is why it's not
15 listed.

16 As far as the requirement to advise the
17 doctor that they are a safety-critical position is
18 concerned, the employees have all been advised of that
19 new requirement, but clearly there's not -- we don't
20 have anyone out there that can confirm that they've
21 done this. It would be a post situation, where
22 obviously if it comes to light that there was a problem
23 with an employee, well, then there's -- this is
24 relatively easy to find out how many times he's gone to

1 the doctor in the past, and why the doctor wasn't aware
2 of this, but there is, you know, obviously no situation
3 where there's someone sitting beside him to confirm
4 that he's going to tell the doctor that.

5 MS. SUN: I'm not clear, then, on the alcohol
6 and drug component. Does that -- is that basically a
7 critical evaluation for signs and symptoms of abuse or
8 does that include periodic alcohol and drug testing
9 when they have their exam?

10 MR. WATTS: There's two components to it.
11 First of all, in the periodic evaluation, it's done
12 every three to five years, depending again on age. One
13 of the specific areas that a doctor is asked to review
14 is potential for drug and alcohol dependency by the
15 patient that he's looking at.

16 In addition, doctors, through the various
17 communications, are told that whenever someone comes in
18 for any reason to meet with the doctor, not just a
19 periodic, if they have concerns over any of these
20 areas, one of them being drug and alcohol dependency,
21 that they should advise the railway's chief medical
22 officer.

23 MS. SUN: But there's no testing component?

24 MR. WATTS: There's no random test -- no.

1 There's no actual testing component, automatic testing
2 component associated with the periodic medical. No,
3 there isn't.

4 MS. SUN: You had mentioned that you were
5 concerned about litigation, if this rule should be
6 issued. Do you know of any current cases that may
7 affect the status of testing in Canada?

8 MR. WATTS: There's a number of human rights
9 challenges that are still before -- waiting to go
10 before the Board concerning the trucking random testing
11 that we're aware of that have not been heard yet.

12 MS. SUN: Would you also, in your supplement,
13 please identify those cases that we can also monitor as
14 they progress?

15 MR. WATTS: Okay.

16 MS. SUN: And does the Canadian Human Rights
17 Act apply to rail operations in the United States?

18 MR. WATTS: It applies to Canadian citizens.
19 I'm not a lawyer. So, I couldn't tell you where the
20 dividing line is, but certainly it applies to all
21 Canadian citizens, and the random testing would take
22 place in Canada. So, therefore, I would suspect that
23 that aspect of it would certainly cover those
24 employees.

1 MS. SUN: Would the Act prohibit random drug
2 testing if it occurred in the United States?

3 MR. WATTS: I don't know. I'm not a lawyer.
4 I couldn't tell you.

5 MS. SUN: What are the penalties if an
6 employee refuses to take a test?

7 MR. WATTS: There are no penalties. Under
8 the Human Rights Act, an employee is allowed to refuse
9 to take a random test, and they have to be accommodated
10 to the degree that's possible by the employer.

11 MS. SUN: And what if they are found to be
12 impaired while on the job?

13 MR. WATTS: What if they're found to be
14 impaired? In the railway environment, there is Rule G,
15 which would kick in, and they would go through the --
16 what's the word I'm thinking of? The rule violation
17 process under Rule G of the Canadian Operating Rules.
18 There's also, under CN's drug and alcohol policy, a
19 whole violation process. It's not all that similar to
20 the U.S., in that they've been asked to go into an
21 assessment and potential treatment situation.

22 MS. SUN: Thank you.

23 MR. COTHEN: Mr. Allen?

24 MR. ALLEN: If I could go back to the medical

1 again, let me ask you, what is the plan for -- to check
2 the quality of these medical reviews and examinations
3 and so forth?

4 The reason I bring that up, I recently have
5 been associated with some FHWA briefings in that they
6 have a similar requirement under the U.S. FHWA rules
7 for medical review of drivers, and one of the concerns
8 that came to me was that on those type of medical
9 reviews for that laundry list of medical targets, if
10 you would, the usual average time was 15 minutes to do
11 all of that and that, of course, has gotten the FHWA
12 and the DOT very concerned that there may be some
13 shortcuts taken and without definitive tests, like Ms.
14 Sun was bringing up, that any substance abuse problems
15 or issues may not be picked up in that time.

16 MR. WATTS: The tests that are conducted by
17 the medical community are reviewed by the company's
18 chief medical officer.

19 Now, obviously if they note things that --
20 forms and results that aren't being filled out in a
21 manner that indicates that the person has actually done
22 a proper job of looking at the patient, they would get
23 back to the individual doctor.

24 But, quite frankly, to the point you're

1 making, in a lot of cases, a person that goes in for
2 one of these tests, you have your eye and vision test
3 which, of course, has certain preset requirements, but
4 a lot of these other things, the cardiovascular and
5 such, is not a major deal in terms of a major test
6 that's required. It's a matter of listening to the
7 heart, for instance, and then if there's tell-tale
8 signs of problems, taking it a step further, but if
9 there are no tell-tale signs, and if the patient has
10 not indicated any particular problems, that's probably
11 a situation that would not require a follow-up or more
12 substantial tests.

13 MR. ALLEN: Okay. Thank you.

14 MR. WATTS: It would be the same for drug and
15 alcohol. I mean, unless there's tell-tale signs or
16 unless there is information that's provided as part of
17 talking to the person, then.

18 MR. COTHEN: Mr. Watts, you've been very
19 patient, and we thank you for responding to questions.

20 Could you consider for supplementing the
21 record helping us out a little bit more in terms of the
22 level of effort on these programs?

23 We did a full search of our Management
24 Information System and found a relatively small number

1 of post-accident -- these are reasonable cause post-
2 accident events involved?

3 MR. WATTS: No. That's yours.

4 MR. COTHEN: Ours. Okay.

5 MR. WATTS: So, that would have been in the
6 U.S.

7 MR. COTHEN: We found a relatively small
8 number of post-accident events in the U.S. on the two
9 major Canadian railroads that operate into the United
10 States, and I don't think we have much information on
11 carrier programs with respect to reasonable cause
12 testing, reasonable suspicion tests that may have been
13 conducted, any chemical testing that might have been
14 conducted on the crews that are in the class that we're
15 talking about here that would operate across the
16 international border to a terminus in the United
17 States.

18 So, if the company has any information as to
19 the level of effort in those programs which has been
20 authorized since 1986, if we could add that to the
21 record.

22 MR. WATTS: We're talking -- just to be
23 clear, we're talking about Canadian-based train crews
24 who have triggered, for lack of a better word, post-

1 accident or cause or suspicion testing while operating
2 in the U.S.?

3 MR. COTHEN: Yes.

4 (Pause)

5 MR. COTHEN: I also want to make sure that I
6 ask. One of the filings in this proceeding pointed out
7 the fairly extensive and definitive criminal laws in
8 Canada with respect to particularly alcohol use by
9 transportation employees.

10 One of the experiences that we had, which may
11 not be at all relevant to the Canadian experience or it
12 may be relevant to the Canadian experience, was that
13 those laws in the United States were seldom actually
14 enforced, even in the case of major catastrophes.

15 So, if, for the record, you could inquire of
16 your colleagues as to any knowledge regarding
17 prosecutions under the criminal laws in effect in
18 Canada with respect to either alcohol or drug use?
19 That would be a request extended to all parties and
20 attendees who might have information.

21 MR. WATTS: I have a problem with the set-up
22 here. The speakers, I think, are pointing that way.
23 So, it's very difficult to hear some of the comments.
24 I heard something about you're looking for information

1 on prosecutions, but I didn't hear all the details.

2 It's very difficult to hear the questions.

3 MR. COTHEN: I'm trying to keep my voice down
4 because I can hear myself as well, and I don't like
5 that very much.

6 The issue is enforcement through prosecution
7 of transportation employees, including railroad
8 employees, who might be intoxicated on the job or under
9 the influence of drugs on the job. Criminal
10 prosecutions.

11 MR. WATTS: Okay.

12 MR. COTHEN: Again, we have found that in the
13 United States, that such laws were seldom utilized and
14 certainly not utilized short of a major catastrophe,
15 and it's been pointed out to us by another party filing
16 in this proceeding that those statutes are on the books
17 and are certainly relevant to consideration here.

18 So, to the extent that they're enforced, that
19 would be something we would want to consider.

20 Obviously, we're talking about activities that are
21 conducted in the United States, presumably outside the
22 reach of both laws, but conduct may be tempered by
23 expectations that have been created at the site of
24 principal employment.

1 MR. WATTS: Again, just so I'm clear, we're
2 talking about criminal prosecution of train crews in
3 Canada, under the Canadian law?

4 MR. COTHEN: Right.

5 MR. WATTS: Okay.

6 MR. COTHEN: Ms. Sun? He's very patient.
7 One more, I think.

8 MS. SUN: I just have two more questions, Mr.
9 Watts.

10 Do you -- does CN plan any expansion of the
11 number of miles that they operate in the U.S.?

12 MR. WATTS: We have no plans.

13 MS. SUN: With Canadian crews?

14 MR. WATTS: We have no plans at this time,
15 but as I said, I wouldn't guarantee you anything, but
16 there's no plans, no.

17 MS. SUN: Okay. Thank you.

18 MR. COTHEN: Thanks very much.

19 MR. ALLEN: I was just trying to figure out
20 how that was two.

21 MS. SUN: Well, he kind of answered my second
22 question as well.

23 MR. COTHEN: Very good. Before someone else
24 thinks of a question, please step down.

1 Thank you very much for your testimony. We
2 appreciate it very much.

3 MR. WATTS: You're welcome. Let me give you
4 a copy of our submission while I'm here.

5 MS. SUN: Thank you.

6 MR. COTHEN: The Chair's trying to proceed
7 here to be fair, based upon who signed up first and
8 also to get a little intermingling of points of view.

9 Could we have Mr. Donald Tennant, UTU Canada
10 Legislative Director, come forward, please?

11 Mr. Tennant, if you could identify yourself
12 for the record and spell your name for the court
13 reporter and proceed, please, sir?

14 Statement of Don Tennant

15 UTU Canada

16 MR. TENNANT: Mr. Chairman, Members of the
17 Panel, my name is Don Tennant. Don, D-O-N, Tennant,
18 T-E-N-N-A-N-T. I'm the Alternate Canadian Legislative
19 Director, UTU Canada, and I'm representing UTU Canada.

20 As I understand it, Mr. Chairman, you have
21 copies of my presentation already previously sent in.
22 So, I didn't --

23 MR. COTHEN: That's correct, sir.

24 MR. TENNANT: Okay. What I'm going to do

1 here, and I don't know how it's laid out in front of
2 you, I have an executive summary, but what I'm going to
3 do for the oral record is go into the submission and
4 then into the executive summary, if that would be okay
5 with the panel.

6 MR. COTHEN: Yes, sir.

7 MR. TENNANT: Thank you, sir.

8 Submission of the United Transportation
9 Union, Canada.

10 1. The United Transportation Union, Canada,
11 welcomes this opportunity to present its views and
12 concerns on the matter being considered by the
13 Department of Transportation and the Federal Railroad
14 Administration to narrow the scope of the exemptions
15 currently in place for certain operations by foreign
16 railroads from some of the regulatory requirements;
17 specifically, the exemption of the requirements for
18 random alcohol and drug testing.

19 From the outset, United Transportation Union,
20 Canada, wishes to go on the record as being opposed to
21 the lifting of these exemptions for a variety of
22 reasons which are set out below.

23 We would also like to emphatically state that
24 we support the right of any sovereign state to apply

1 its laws to the fullest extent within the confines of
2 its boundaries.

3 Extraterritorial Application of U.S. Law. We
4 are concerned that the lifting of the moratorium on the
5 requirements for random testing inasmuch as it applies
6 to employees in Canada-domiciled carriers is nothing
7 more than an unjustified intrusion upon Canadian
8 legislation and sovereignty.

9 As this matter being of such importance, the
10 Canadian Government itself would have exercised its
11 legislative authority and implemented a similar
12 regulatory regime.

13 4. To the contrary, the Canadian Government
14 has taken the position that the concept of drug and/or
15 alcohol testing is not of such importance as to
16 consider legislative intervention.

17 The railway industry in Canada has a
18 longstanding process in place to address any concerns
19 in behavior as it might apply to the subject matter at
20 hand. Additionally, the industry and labor unions have
21 worked hand-in-hand to develop such a process that was
22 not only suitable and adequate but acceptable as well,
23 all under the watchful eye of the regulator and
24 consistent with human rights legislation.

1 Enforcement and Compliance Issues. With
2 respect to enforcement and compliance matters, should
3 such requirements come into force, we are concerned
4 about the jurisdiction of compliance officers and how
5 such requirements are to be enforced and by whom.

6 Clearly, we do not expect the U.S. regulatory
7 authorities to audit compliance and/or enforcement on
8 Canadian soil. At the same time, we are befuddled as
9 well as to what the legislation mechanisms will be put
10 in place to provide for Canadian regulatory authorities
11 to perform compliance audits of a foreign law whose
12 jurisdiction belongs with a foreign authority.

13 Likewise, do the U.S. regulatory bodies
14 desire to pass their oversight authorities on to the
15 regulatory agencies of another country? How is it
16 ensured that such agreements or mechanisms comply with
17 other Canadian legislative requirements?

18 The Canadian legislative framework currently
19 consists -- currently provides under the Railway Safety
20 Act the mechanism by which the industry must operate in
21 respect of safety matters. Included within the
22 framework of the Railway Safety Act is a requirement
23 for a railway safety consultant committee which is a
24 broad-based public forum where all interested parties

1 discuss safety-related issues. The RSCC is the only
2 broad-based public forum of its kind in North America.

3 The matter at hand has never been brought
4 before the RSCC as a matter of discussion, which in and
5 of itself speaks volumes to the prioritization
6 placement of this issue within the context of the
7 industry and the public within Canada, and an issue of
8 such magnitude and scope needs to be brought before the
9 RSCC for discussion before any such requirements should
10 reasonably be expected to be implemented.

11 Additionally, the Canadian legislative
12 framework includes statutory rights, duties and
13 obligations, such as those found under the Canada Labor
14 Code, whereby work place parties have some jurisdiction
15 over safety. How such a requirement would reasonably
16 be expected to be complied with with those requirements
17 must be worked out prior to any proposed
18 implementation.

19 Now, Medical Rule. Canada has the most
20 stringent and detailed medical rules for rail employees
21 of any jurisdiction within North America which are
22 required under the Railway Safety Act and which were
23 developed on a consultation basis between the work
24 place parties.

1 The matter of substance testing are addressed
2 within the framework of these rules. However, there is
3 a significant difference from what is being proposed by
4 the DOT through the FRA. Those who are found to have
5 substance abuse or use issues are still treated with
6 some modicum of human dignity. It is treated as an
7 illness and compliance with the concept of the basic
8 human rights and legislation that addresses the issue
9 which is found throughout most of our countries.

10 Furthermore, the requirements under the
11 Canadian rule are actually more stringent than the U.S.
12 requirements. The Canadian rule is based on zero
13 tolerance while the U.S. model allows an acceptable
14 level.

15 Requirements of the Canadian rule have been
16 thoroughly explained to the Canadian medical community
17 who play an internal part in the process of ensuring
18 employees are medically fit-for-duty and are in
19 compliance with the rule. Unlike anywhere else in
20 North America, the medical rules currently in place in
21 Canada were adopted under the framework of the Railroad
22 Safety Act and as such are subject to oversight by
23 regulatory authorities.

24 These safe rules clearly define differing

1 levels of employees based on selected criteria. The
2 criteria for the most part determined who was critical
3 to safety or to safe railroad operation and who was
4 sensitive to safe railway operations. These rules and
5 criteria were a consequence of the requirement of human
6 rights legislation and jurisprudence at the time the
7 rules were developed.

8 The medical rules and guidelines that the
9 chief medical officer of each of the respective
10 railways have developed to implement such rules are the
11 most comprehensive of any similar jurisdiction in
12 America. To place an add-on to these rules, such as
13 random drug testing, after the well-thought-out
14 development and implementation is a foolish and
15 unrealistic burden and expectation of the industry and
16 its employees in Canada.

17 Had the issue of drug or alcohol random
18 testing been an issue within the industry or country,
19 the rules should have been developed with this in mind.

20 Such is not the case, however.

21 The lack of empirical data to suggest that
22 this is a problem of such magnitude within the railway
23 industry in Canada concerning drug or alcohol use or
24 abuse is indicative of the reasons why the medical

1 rules in Canada treat the area of concern as a disease
2 with dignity, not as some shot-gun approach that
3 condemns the innocent while doing nothing to either
4 catch the guilty or, more importantly, eradicate the
5 problem.

6 Trade Dispute. While there may be some
7 argument as to whether or not the instant matter can be
8 seen as an unfair trade practice, there remains no
9 doubt that the matter can be brought forward as such
10 dispute before the various international bodies.

11 Human Rights and Civil Liberties. The
12 Canadian Government has the foresight to stay away from
13 imposing legislation that would ultimately challenge
14 the basic human rights of an individual under accepted
15 international standards. That foresight, coupled with
16 the seeming lack of importance given to the matter of
17 drug testing relative to safety issues, has until now
18 kept such intrusive procedures and/or requirements off
19 the shelves of the Canadian legislative requirements.

20 There have been numerous cases brought before
21 the Human Rights Tribunal in respect of drug and
22 alcohol testing, several of which have been
23 subsequently heard by the Federal Court of Canada with
24 varying degrees of success and/or failure. The point

1 being made here is such that even if the U.S.
2 requirement is applied to employees of Canadian-
3 domiciled carriers, it is not in an effect itself from
4 challenges that may be brought before the Canadian or
5 international jurisdictional systems, whether based on
6 the Charter Rights and Freedoms, the Human Rights Act,
7 the Constitution Act and/or any other Canadian or
8 international legal standard or authority.

9 Costs. Should the moratorium be lifted,
10 thereby including employees of Canada-domiciled
11 carriers in random drug testing pools, clearly, this
12 will be an added economic burden to the carriers not
13 currently experienced by them. The cost of the test,
14 education, training, information and loss of
15 productivity is not within the realm of realistic or
16 acceptable limits and/or cost benefits analysis, nor
17 upon reviewing the industry's experience on matters
18 concerning substance use or abuse, we do not believe it
19 serves any meaningful purpose to have the Canadian
20 railway industry create a cottage industry for
21 laboratories to perform testing as a result of an
22 imposed requirement on them and their employees by a
23 foreign sovereign state. The requirement we might add
24 that has no foundation in the context of Canadian

1 railways based on our experience.

2 Chain of Custody. Not unlike the concern
3 previously expressed by this office in 1996 in the
4 representation to the Federal Highway Administration in
5 response to the DOT's Final Rule on Controlled
6 Substance and Alcohol Use in Testing, foreign-based
7 motor carriers and drivers under 49 CFR Part 382, we
8 continue to have concerns about the chain of custody
9 that will be used in this moratorium on random drug
10 testing for railways be lifted.

11 Not unlike that as noted above, we have
12 concerns about the certification of laboratories that
13 would be required or otherwise handle any collection
14 samples. Will they be certified based on U.S. or
15 Canadian criteria, and who would provide the
16 certification, a Canadian governing body or one from
17 the U.S.? Should it be based on the Canadian criteria
18 and/or by Canadian authority? Considering that this
19 involves the railway industry, the matter falls within
20 the scope and/or purview of the RSCC.

21 Furthermore, considering that this may be in
22 fact be considered a matter relative to occupational
23 safety and health of employees of a railway, the matter
24 also falls under the purview of the requirements as set

1 out in the Canadian Labor Code, Part 2, and as one
2 might appreciate, this is not a simple matter.

3 Once again, the matter of jurisdiction for
4 inspection, testing, maintenance, compliance and
5 auditing process comes to the forefront.

6 Education and Training. Insofar as the
7 possible implementation of such a requirements are
8 contemplated by the DOT through the FRA, who will
9 provide what form of education and training? At whose
10 expense? How is the training developed and by whom and
11 at whose expense?

12 There are numerous questions that arise in
13 that regard, not to mention our concern that the
14 requirements of the ratified ILO Convention and any
15 other contractual language being in there met.

16 Alternative Measures. In the event all of
17 which we have stated herein falls on deaf ears and the
18 FRA and the DOT move forward with their proposal to
19 remove the exemption currently in place, thereby
20 adversely affecting employees of foreign railways, the
21 United Transportation Union, Canada, notwithstanding
22 our concerns previously expressed, offer the following
23 as an alternative to the wholesale inclusion of its
24 employees of Canadian railways solely as a means to

1 mitigate the adverse effects such a decision would have
2 on those employees.

3 The alternatives set out below should not be
4 considered as any measure or acceptance on our part of
5 the relocation or modification of such exemption. Such
6 alternatives are offered without prejudice or
7 precedent.

8 A. Any consideration for repeal or
9 modification of the exemption currently in place should
10 only be considered to the extent that such modification
11 would capture or include only those employees of
12 Canadian railways who operate on U.S. soil. These
13 employees should be determined by cross-referencing
14 U.S. RRB information that is filed with the Board.

15 B. Any application of the modification
16 exemption in the event that the above is not a
17 consideration should be limited to geographical area
18 along the Canadian-U.S. border that reflects those
19 areas of terminals where employees have a reasonable
20 likelihood of entering into international service and
21 only then would employees of given terminals within the
22 geographical boundary actually have a likelihood of
23 entering the U.S.

24 Any requirements that affect the pre-

1 determined group of affected employees subject to
2 random testing requirements should be applied to the
3 supervisor of those same employees. In other words,
4 the supervisors of employees captured by their criteria
5 for random testing should be included in the test pool
6 as well.

7 The scenarios listed above are offered only
8 as alternatives to the wholesale across-the-board
9 application of the U.S. requirements for random drug
10 testing of all employees of the Canadian railways who
11 engage in international transborder shipments.

12 Consideration must be given to those
13 situations where not all railways or railway terminals
14 on the Canadian side of the border actually engage in
15 moving traffic over the border. In other words, not
16 all terminals on the Canadian side of the border
17 actually pull cars in the U.S., and in such incidents,
18 it would not be useful to exercise -- to burden such
19 situations or employer-employees with the contemplated
20 regulatory or rules requirement.

21 Hence, even if the employees were within a
22 defined boundary as suggested above, it would not make
23 much sense including them in a pool of employees for
24 testing purposes. Obviously there would be additional

1 cost involved including such employees and the
2 resultant data would be obscured as a result of having
3 persons in the pool that actually worked in the U.S.
4 soil.

5 Now, in summary of all this, the United
6 Transportation Union, Canada, is opposed to any rule or
7 other instrument that has the effect of causing
8 employees of Canadian-domiciled carriers to be required
9 to submit to random drug testing on other than U.S.
10 soil.

11 2. The United Transportation Union, Canada,
12 supports the right of the sovereign state to apply its
13 laws to the fullest extent within the confines of its
14 own borders.

15 3. We are concerned with the effect of
16 jurisdiction or authority such requirements might have
17 on Canadian regulatory authorities, in addition to our
18 concern in respect to the cost to be borne by the
19 Canadian taxpayers should the Canadian authorities be
20 required to handle the oversight of the U.S. regulatory
21 requirements.

22 4. The Canadian legislative framework
23 surpasses any jurisdiction within North America in
24 respect of a mechanism that provides for diligent and

1 high-end levels of safety.

2 5. The Canadian railway industry in Canada
3 has the most stringent employee medical requirements of
4 any mode of transportation under any jurisdiction in
5 North America. These same medical rules provide better
6 mechanisms to handle substance issues while maintaining
7 the personal and human dignity of the employees.

8 6. There is no demonstrated need nor is
9 there empirical data that supports the need for random
10 substance testing of employees working for Canadian-
11 domiciled carriers. Based on Canadian experience, this
12 is underlined by the current absence of such
13 requirements within the industry in Canada and the non-
14 existent contemplation of any similar requirement by
15 Canadian authorities.

16 7. Random testing does nothing to stop the
17 use or abuse of substances.

18 8. Practices, such as random testing of
19 employees denies the fundamental human rights afforded
20 Canadians under the Human Rights Act and the Canadian
21 Charter of Rights and Freedoms.

22 9. The benefits associated with such a
23 requirement are outweighed by the costs.

24 10. Issues, such as chain of custody,

1 laboratory certification and accreditation and
2 education and training are matters that demonstrate the
3 depth of the issues that will arise as a result of the
4 implementation of such a requirement and such matter
5 can only be resolved through a consultative process
6 which takes considerable time and expense.

7 11. With precedent or prejudice, issues
8 raised by the United Transportation Union, Canada, in
9 this submission, alternative measures that mitigates
10 some of the most contentious issues are offered for
11 consideration.

12 That concludes my presentation, Mr. Chairman,
13 and Panel Members. Thank you.

14 MR. COTHEN: Thank you, sir.

15 Any questions from the FRA Panel? Patricia?

16 MS. SUN: Mr. Tennant, your statement refers
17 to concerns that the UTU Canada has about the chain of
18 custody that is used in DOT testing that you expressed
19 to FHWA '96.

20 Could you tell us what those concerns are?

21 MR. TENNANT: The experience that we've had
22 with that is primarily when the issue of the post-
23 accident takes place, and all the events of -- the
24 event takes place, such as the people on the site, the

1 peace officers, the securing of the samples, the whole
2 regulatory framework in that process.

3 Basically, I'll use an example. We had a
4 case where there was a crossing accident in Minnesota
5 which was an international service, and in meeting this
6 on-site, everybody was on site and then the crew was
7 asked for the proper sample, and this is a CN case, CN
8 counsel happened to be on site, and because of the
9 method of securing the samples and things like that,
10 all this didn't take place, and then, also, the whole
11 understanding and the educational process of the crew
12 involved with their rights and, you know, what has to
13 take place in these processes.

14 I don't know if that meets the reg or not.

15 MS. SUN: I'm not clear. Is it the whole
16 process or is it the form itself? Because you kind of
17 talked mostly about the chain of custody.

18 MR. TENNANT: Yes.

19 MS. SUN: Is there some problem with the
20 form?

21 MR. TENNANT: I can't comment, other than the
22 actual -- the intent of that specifics on it. I'm just
23 -- you know, to put it bluntly, I'm just a presenter.
24 I'm not going to get into the intent of the actual form

1 itself.

2 MR. COTHEN: Maybe they can submit that to
3 us.

4 MS. SUN: Yes. If you could submit to the
5 record what your concerns are?

6 MR. TENNANT: Yes.

7 MS. SUN: And I also note that the form was
8 changed in the last revision of DOT Testing Rules. So,
9 I don't know if that may have affected the concerns
10 that UTU has.

11 I'm also wondering, for our benefit, what is
12 the authority of the RSCC, and who are the members?

13 MR. TENNANT: Transport Canada.

14 MR. ALLEN: Canadian version of OSHA, I
15 guess.

16 MS. SUN: Is it an advisory board of
17 Transport Canada?

18 MR. COTHEN: So, we can get this all on the
19 record, it's Railway Safety something.

20 MR. TENNANT: I think the acronym, it's
21 spelled out in -- I can give you the --

22 MR. COTHEN: Perhaps I can describe to you
23 and our colleagues, it is similar in purpose of the
24 Railroad Safety Advisory Committee in the sense of

1 permitting persons with interest in railway safety in
2 Canada to come to the table and participate in policy
3 development, and perhaps I can ask Mr. Pensione if he
4 would just be so kind as to drop in the mail to us some
5 informational document that we would have for the
6 record so that we don't mischaracterize that.

7 Any further questions for Mr. Tennant? Ms.
8 Sun's still on hers, and then we'll go to Mr. Allen.

9 MS. SUN: Also, Mr. Tennant, there's just two
10 other acronyms I don't know what they stand for. What
11 is the ILO? You talked about ratified ILO Convention?

12 MR. TENNANT: I'll have to -- I'm not sure
13 about that, too. I thought that was another group, but
14 that was typed in here, and I'll have to give you the
15 full one on that.

16 MS. SUN: Okay. Could you also let us know
17 what the U.S. RRB is?

18 MR. TENNANT: Oh, U.S. Railroad Retirement
19 Board.

20 MS. SUN: Oh, okay. Wonderful.

21 MR. TENNANT: Yeah.

22 MS. SUN: And you also stated that there is
23 no empirical data on substance abuse problems among
24 Canadian railroad employees.

1 Are you aware of any current studies on the
2 extent of substance abuse?

3 MR. TENNANT: No, I'm not. No.

4 MR. COTHEN: Mr. Allen?

5 MR. ALLEN: On your Point Number 10, on the
6 Medical Rules, you mentioned that the Canadian rule is
7 based on prohibitions, and you're more stringent than
8 the U.S. requires, that yours is zero tolerance.

9 My question is, what mechanism is used to
10 measure zero tolerance?

11 MR. TENNANT: Okay. In Mr. Watts'
12 presentation, he referenced, for example, where we do
13 have the case where a peace officer becomes involved,
14 and you're involved in a blood or breathalyzer. Under
15 the Canadian law, and I can speak to this for
16 transportation, the Federal Transportation part of it
17 all, the railway carrier or employee, whether they
18 operate the locomotive or as a member of the crew, are
19 all considered to be operating that locomotive, and
20 with cost for the same thing, a breathalyzer or blood
21 and urine, you know, under the Canadian law and the
22 circumstances can take place, and any reading under,
23 you know, our General Rules is zero tolerance.

24 Rule G is quite specific and that's what we

1 operate, and then under -- because of last November,
2 the railway rules governing safety-critical positions,
3 what we produced, and I didn't -- you know, it just
4 came up, we produced this, and we get it out to the
5 members now, and so they can take it to the treating
6 physicians because what happens now, and I've been
7 involved in cases, and I can speak to experience, if
8 the supervisor has problems, whether the person is
9 demonstrating the psychological or, you know, like
10 that, they will pull them out of service and refer them
11 to the medical department, and then if that medical
12 department or the officer, the medical doctor at the
13 time, whether it be psychological or the person's on
14 some form of medication and things aren't right, will
15 refer them to either a psychiatrist or a group, and Mr.
16 Watts referred to the drug and alcohol policy on CN.

17 I can speak from experience on this because
18 when this came into policy, what happens in our system
19 is that if a railway employee in a safety-critical
20 position is -- has their driver's license lifted on a
21 road inspection by the peace officer, it would be RCMP
22 and local police, and they are charged, they were
23 required to report it within X amount of hours, and
24 maybe Mr. Watts, I believe, what is it, 24 hours?

1 With that, now, it could be a case of one
2 time, you're caught short-type thing or maybe the
3 person has a problem, therefore now in my experience,
4 and I've been involved in this, the person is now
5 referred to -- in the case of this, this was in
6 Manitoba, Canada. The Drug and Alcohol Addictions
7 Foundation were the appropriate testing to see if the
8 person has a problem.

9 Now, I don't know. Maybe I've said lots and
10 didn't say the right thing.

11 MR. ALLEN: No. I appreciate that.

12 For point of information, the U.S. standard
13 under the DOT is a .02, but our testing with the
14 methodologies and the breathalyzers, evidential
15 breathalyzers that we use, that is the lowest level
16 that we can be sure that that person has that alcohol
17 in their system. So, we have that as a cut-off level,
18 so that we don't falsely accuse someone of anything
19 lower than that. So, that's part of our balancing of
20 the program here. We consider that zero tolerance,
21 also.

22 MR. TENNANT: Okay. What I would like to
23 draw to your attention, too, which is sort of
24 interesting, Mr. Chairman had spoken on marijuana or

1 cannabis. Cannabis now technically under some
2 circumstances in Canada is legal and that's for the
3 treatment of people with cancer and all that.

4 We actually have a place in Manitoba that's
5 federally regulated to produce it and for those medical
6 purposes and that would produce an interesting -- you
7 know, as I listened to that, because of the synergistic
8 effects of some of these drugs, cannabis is actually,
9 what, carried in your fat tissues throughout the
10 periods of nine months maybe or longer, as I
11 understand.

12 No, no. I'm just throwing this out, and one
13 of the things that, you know, I sit on a few different
14 boards, and one of them is a clinic, and the biggest
15 thing that the medical community, as related to in the
16 last seminar that we were at, is the synergistic
17 effects of the combination even on over-the-counter
18 drugs, which is getting to be the tough part in it.

19 The alcohol and your criminal drugs
20 experience that I can speak on it from my involvement
21 in it, we're not seeing that, but what we're seeing is
22 the prescription drugs, you know, and what my
23 colleague, Mr. Watts, mentioned is, Part 2, the Canada
24 Labor Code, and that's where the employee has a right

1 to take action against an operator of a piece of
2 equipment by refusing to work him.

3 We're starting to see more and more of this
4 type rather than get into all this.

5 MR. COTHEN: Thank you very much. We
6 appreciate your testimony today.

7 We will take a break. When we return, at
8 approximately five minutes to the hour, we'll ask
9 Canadian Pacific witnesses to be at the table, and if I
10 could ask that the individual for International
11 Brotherhood of Locomotive Engineers witness to see me
12 as we begin the break, so I get the information
13 correct.

14 We'll recess at this time.

15 (Whereupon, a recess was taken.)

16 MR. COTHEN: While we were at the break, the
17 representative from Canadian Pacific, Ms. Ackermans,
18 took her place, and I turned off my microphone.

19 Ms. Ackermans, from Canadian Pacific, if you
20 could identify yourself for the record, and please
21 proceed.

22

23

24 Statement of Faye Ackermans

1 Canadian Pacific Railway

2 MS. ACKERMANS: My name is Faye Ackermans,
3 F-A-Y-E A-C-K-E-R-M-A-N-S. I'm General Manager, Safety
4 and Regulatory Affairs at Canadian Pacific Railway.

5 Since 1992, I've had responsibility at
6 Canadian Pacific Railway for regulatory oversight of
7 the rules and regulations affecting safe train
8 operations in both Canada and the United States. Until
9 the acquisition of the Illinois Central by Canadian
10 National, CPR was the only Class 1 North American
11 railway with substantial operations in both of our
12 countries.

13 20 to 25 percent of staff and track are U.S.-
14 based. This has given us a somewhat unique perspective
15 of rail-operating regulations promulgated by both the
16 Federal Railroad Administration and Transport Canada.

17 We have worked within both systems for more
18 than a decade. My staff in the U.S. are responsible,
19 among other things, for accident reporting to FRA and
20 ensuring drug and alcohol testing conforms to 49 CFR
21 Part 219 requirements.

22 The U.S. and Canada have largely equivalent
23 systems in terms of the safety of operations afforded
24 rail employees and the communities through which we

1 operate. But the legal and social systems in our two
2 countries are different. They place different
3 constraints on rail legislation and regulations, and
4 they place different requirements on the railways and
5 the regulators.

6 The laws and regulations governing rail
7 safety are not and can never be identical, but minor
8 differences should not be used to create entitlements
9 to trade in the rail industry. Today in this hearing,
10 I intend to advance several arguments in opposition to
11 FRA's Notice of Proposed Rulemaking to remove current
12 exemptions for foreign railroads, foreign-based
13 employees, contained within 49 CFR Part 219.

14 These arguments are more fully outlined in
15 our written submission, and I will only hit the
16 highlights. These arguments include there are no
17 compelling safety reasons to warrant this change at
18 this time. The requirement to randomly drug test
19 Canadians in Canada is hugely problematic from a human
20 rights perspective.

21 Other legislation, including that governing
22 rail accident investigation and provincial coroner's
23 powers limit the expansion of Part 219 post-accident
24 testing and testing for cause for events that occur

1 outside of the United States. Any comparison to the
2 trucking industry used by FRA is inappropriate.
3 Arguably, comparing the rail mode to aeronautics is
4 more appropriate than trucking.

5 The issue is more properly handled between
6 governments, either bilaterally or through NAFTA,
7 rather than between the regulator and the railways.
8 FRA has vastly under-estimated the costs of their
9 proposal.

10 Firstly, there are no compelling safety
11 reasons that warrant this change at this time. FRA's
12 been down this regulatory road before. In 1992, an
13 Advanced Notice of Proposed Rulemaking requested
14 comments on issues arising from requirements to test
15 foreign railroads operating within the United States.

16 In 1994, FRA withdrew the Advanced Notice,
17 explaining foreign railroads generally enter into the
18 United States territory only for limited distances, and
19 these railways already comply with the existing FRA
20 rules on post-accident and for-cause testing.

21 In light of this and FRA's successful
22 compliance record with foreign railroads, FRA will not
23 proceed with a separate rulemaking on international
24 application of the Act.

1 The factors present in 1994, which permitted
2 the safe withdrawal of the Advanced Notice, namely
3 limited distance, limited operation, limited risk and a
4 good compliance record, exist today.

5 Let me explain. Distances operated are
6 limited. Attached to this statement is a CPR System
7 Map indicating the locations where traffic is
8 interchanged, including the number of trains at each
9 border crossing and numbers of crews and spare board or
10 extra board employees involved.

11 There are seven locations where Canadian
12 crews are operating into the United States. From west
13 to east, these are from the border to Eastport, Idaho,
14 1.7 miles; border to Sweet Grass, Montana, two miles;
15 border to Portal, North Dakota, 2.8 miles; border to
16 Noyes, Minnesota, 3.2 miles; border to Detroit,
17 Michigan, nine miles; border to Buffalo, New York, 7.5
18 miles; border to Rouses Point, New York, 1.2 miles.
19 These seven locations total 27.4 miles.

20 The operations are limited. CPR operates an
21 average of 27 each day southbound into the United
22 States, using Canadian crews. Annually, this amounts
23 to about 57,000 total miles. If these 57,000 miles in
24 the U.S. constituted a stand-alone railway, it would

1 rank 354th by size.

2 The risk is limited. Using data supplied by
3 FRA in the Regulatory Impact Statement, and the miles
4 we operate, we estimate that the accidents per million
5 train miles with a primary or secondary cause code of
6 impairment due to drugs or alcohol is less than .004
7 for the 14-year period from '85 to '98, inclusive.

8 I've got some theoretical fatality and injury
9 rates in here. I'm not sure if I want to read them
10 out. They are so remote, but I'll try to do that. We
11 estimate yearly rates for accidents at .0014, for
12 fatalities at .000007, and .000009 for injuries. Total
13 equipment and infrastructure damage costs each year
14 would average about \$315, and total costs, including
15 items such as rerailling damage, lading damage, personal
16 injury costs, would average about \$635 a year.

17 In summary, the risks are extremely low. The
18 number of train miles operated is small. The distances
19 we operate are limited, and we are not aware of any
20 compliance problems with the current 49 CFR Part 219
21 requirements when Canadian crews are in the U.S.

22 The requirement to randomly drug test
23 Canadians in Canada is hugely problematic from a human
24 rights perspective. Decisions of Courts of Appeal,

1 Human Rights Tribunals and labor arbitrations have
2 found there must be a balancing of safety concerns and
3 privacy concerns.

4 Some drug testing may be appropriate for
5 employees in safety-sensitive positions, if such
6 testing is for reasonable and probable cause, post-
7 accident, pre-employment, promotion or return-to-
8 service. To date, random drug testing has been found
9 to be discriminatory and improper, even for safety-
10 sensitive positions.

11 The rationale underlying this decision is
12 that random drug testing does not test for current
13 impairment but only indicates that at some time in the
14 past, the individual used drugs.

15 Other legislation, including that governing
16 rail accident investigation and provincial coroner's
17 powers, limit the expansion of Part 219 post-accident
18 testing and testing for cause for events that occur
19 outside the United States.

20 The Canadian Transportation Accident
21 Investigation Safety Board Act contains powers, such as
22 the ability to seize, preserve and test evidence,
23 exclude persons from accident sites and require persons
24 to submit to medical examinations.

1 Depending upon how these powers are
2 exercised, the Canadian railways may or may not be able
3 to meet FRA post-accident testing or for cause testing
4 for accidents outside of the United States. We are not
5 aware of any jurisprudence in this area.

6 Also, constitutional division of powers
7 between the federal and provincial governments may play
8 a role in post-accident and for cause testing in
9 Canada. Provincial coroners have the power to take
10 charge in accidents where a fatality is involved,
11 including seizing dead bodies.

12 The railways may not be able to take samples
13 for drug testing in those situations, and we would have
14 no control over the laboratories used by coroners to
15 test samples. These examples highlight the legal
16 difficulties in unilaterally extending 49 CFR 219 to
17 Canadian rail employees.

18 Any comparison to the trucking industry used
19 by FRA is inappropriate. The U.S. Federal Motor
20 Carrier Safety Administration applied all of 49 CFR
21 Part 382 to persons and employers of such persons who
22 operate a commercial motor vehicle in the United
23 States. However, there is a marked difference between
24 the exposure associated with foreign-based employees

1 engaged in truck operations and foreign-based rail
2 employees.

3 Rail employees travel on fixed routes for
4 limited distances with relatively few trains. In 1997,
5 30,000 trains crossed the border from Canada to the
6 U.S., including trains operated by U.S. crews returning
7 to the U.S. Contrast this with 5.7 million truck
8 crossings the same year. Trucks can access the U.S.
9 from Canada approximately at 70 border locations, and
10 once in the U.S. can travel over three million miles of
11 highway.

12 It's our understanding that Canadian truckers
13 are currently complying with U.S. drug and alcohol
14 regulations. This is largely a non-unionized
15 environment. Despite that, there have been many
16 complaints to the Canadian Human Rights Commission.
17 The CHRC is currently examining the issue, and we
18 understand they will be issuing a policy ruling some
19 time in 2002.

20 Arguably, comparing a rail mode to
21 aeronautics is more appropriate than trucking. In
22 contrast to trucks, the Federal Aviation Administration
23 has relied on international conventions. In
24 withdrawing their 1992 Advanced Notice of Proposed

1 Rulemaking, one of the reasons FAA gave was that
2 several commenters noted that the laws of the
3 jurisdiction in which their employees are hired could
4 prohibit employers from complying with mandatory
5 testing regulations imposed by the United States.

6 Further, FAA decided that rulemaking was not
7 the best way to ensure safety given the significant
8 practical and legal concerns. In making this decision,
9 FAA was in part relying on their own programs to assess
10 whether foreign air carriers are held to international
11 standards by their country of registry.

12 If FAA can have programs to monitor how well
13 other countries ensure compliance, why can't FRA have a
14 similar relationship with Transport Canada? CPR
15 submits that the rail situation more closely resembles
16 aeronautics than it does trucking.

17 The issue is more properly handled between
18 governments, either bilaterally or through NAFTA rather
19 than between the regulator and the railways. CHRC
20 legislation will not allow random testing of rail
21 employees. Employees' refusal to test could impact
22 cross-border operations or cross-border trade.

23 One potential operating solution would be to
24 exchange all trains in Canada rather than the U.S., and

1 Canadian rail employees share this work as they do
2 today. However, it's not feasible to exchange all
3 traffic on the Canadian side of the border due to
4 existing capacity and infrastructure constraints. Such
5 a restriction could be viewed as a barrier to trade,
6 contrary to international obligations of the United
7 States.

8 Moreover, our recent ruling on Mexican truck
9 safety makes it clear that even for safety reasons,
10 it's inconsistent with NAFTA to absolutely require as a
11 pre-condition of entry that the regulatory systems in
12 the two countries be substantially identical.

13 There is a positive obligation for the U.S.
14 as a NAFTA trading partner to find the least trade-
15 restrictive measure in the extraterritorial extension
16 of its drug and alcohol regulations.

17 CPR submits that an absolute imposition of 49
18 CFR Part 219 as contemplated would be contrary to NAFTA
19 principles. Regulatory differences are best resolved
20 either bilaterally between Canada and the U.S. or
21 through the Land Standards Transportation Subcommittee
22 of NAFTA.

23 Finally, FRA has vastly under-estimated the
24 costs of this proposal. In the Regulatory Impact

1 Analysis Statement, FRA under-estimated the number of
2 currently-assigned Canadian crew members that would be
3 subject to random testing. We also have spare board
4 employees who may be called from time to time which are
5 not included in the estimates, and employees have the
6 right to bid on the pools twice each year. This means
7 that the number of employees potentially impacted each
8 year is much higher than FRA included in its cost
9 analysis.

10 Furthermore, the calculations do not address
11 costs associated with litigation, labor investigations
12 and arbitrations and requirements for companies to
13 accommodate employees who refuse to test up to the
14 level of undue hardship.

15 Let me give you some idea of what the
16 concepts of hardship and undue hardship mean. Suppose
17 the conductor or locomotive engineer in the Canadian
18 pool assigned to take trains into the U.S. refuses to
19 submit to a test at his home terminal. In the U.S.,
20 the employee would be held out-of-service without pay.

21 In Canada, because the appellate-level courts and
22 policy statements by the Canadian Human Rights
23 Commission have found that random testing programs are
24 discriminatory, we would be forced to compensate the

1 employee, perhaps by moving him to a different pool and
2 making up the differences in wages or, if he's not
3 needed in a different pool, pay him to stay home. This
4 would be considered hardship by the Human Rights
5 Commission, but we would be forced to accommodate and
6 pay the employee.

7 Take the scenario further. Let's say a few
8 employees in the pool refuse to submit to testing.
9 This is deemed hardship as well, and we'd have to
10 accommodate these few employees. Now, let's say all
11 the employees in the pool have refused a test, and
12 cross-border commerce at that location is severely
13 impacted. At some point, we could likely argue that
14 all of these costs have gone too far, that the impact
15 on the business is too great to the point of undue
16 hardship, and we would no longer have to accommodate,
17 but this whole process would be incredibly disruptive
18 to cross-border trade and would take many years to
19 settle.

20 What are the costs and the benefits of this
21 Notice? Keep in mind that FRA has under-estimated the
22 number of affected employees and has completely
23 excluded some significant costs associated with the
24 Human Rights legislation. Even if the significantly

1 under-estimated FRA costs with a 20-year present value
2 of \$250,000 are used, we estimate that the 20-year
3 benefits are a mere \$6,700.

4 Conclusions. Nothing has changed since 1994
5 when FRA decided to withdraw the Advanced Notice of
6 Proposed Rulemaking on this subject. The factors
7 present in '94, namely limited distance, limited
8 operations, limited risk and regulatory equivalency,
9 continue to exist today.

10 Changes in Canadian regulatory requirements
11 and railway policies, including medical rules, safety
12 management system regulations and more comprehensive
13 railway drug and alcohol policies, have improved on the
14 situation noted by FRA in 1994.

15 Under the Omnibus Transportation Act, we
16 believe FRA is required to consider applicable laws and
17 regulations of foreign countries and to establish only
18 those requirements that are consistent with the
19 international obligations of the U.S.

20 When the divergent approaches taken by the
21 various modes within U.S. DOT are compared and
22 considering the de minimis nature of Canadian rail
23 employees operating in the U.S., we believe FRA should
24 consider an approach more in line with that taken by

1 aeronautics.

2 There are significant practical and legal
3 barriers in Canadian laws and regulations which would
4 place CPR squarely between compliance with Canadian law
5 and FRA regulations. This would have a direct impact
6 on international trade as Canadian crews could
7 conceivably be prevented from operating in the United
8 States.

9 If Canadian crews were prevented from
10 entering the U.S., border trade would be disrupted. It
11 is not feasible to exchange all traffic from the
12 Canadian side of the border due to existing capacity
13 and infrastructure constraints. This would have
14 direct adverse cost consequences for U.S. and Canadian
15 rail-based shippers and U.S. carriers.

16 U.S. obligations under certain international
17 trade agreements may be at odds with FRA's proposals to
18 extend 49 CFR Part 219 testing requirements to Canadian
19 railway employees. CPR submits that the current
20 exemption for foreign-based foreign railway employees
21 should be continued. We base this on limited distance,
22 limited operations, limited risk, regulatory
23 equivalency, modal comparisons, conflicts with Canadian
24 law and international law implications.

1 If there is a bona fide and compelling reason
2 supported by valid risk assessments to extend 49 CFR
3 Part 219 to foreign-based foreign railway employees, it
4 should be negotiated directly by the Governments of the
5 United States and Canada rather than between FRA and
6 Canadian railroads in a rulemaking process.

7 Given the limited distances involved and the
8 interchange of rail traffic in both our countries, CPR
9 urges both FRA and Transport Canada to consider the
10 notion of a border zone and to negotiate the rules and
11 regulations that would apply with a goal of eliminating
12 unnecessary regulatory impediments. Precedent for this
13 already exists within two Canadian regulations that
14 alter requirements for U.S. crews coming into Canada.

15 That ends my oral statement. I'll be pleased
16 to take questions.

17 MR. COTHEN: Thank you very much.

18 Questions from the Panel?

19 MS. SUN: I have a few questions. Does CP
20 plan to implement a post-accident testing program
21 comparable to the FRA program?

22 MS. ACKERMANS: We've done a little bit of
23 post-accident testing when we felt that there was human
24 error involved in the train accident. We haven't got

1 concrete plans right now to push that into an FRA-style
2 post-accident. I've asked the unions to consider if
3 they would enter into some sort of, you know,
4 arrangement where we could start to talk that through.

5 We have a policy, a medical policy. We have
6 a drug and alcohol policy, drug and alcohol testing
7 procedures in place that have been now redrafted, and
8 we're about to put out in the work place again that do
9 not include post-accident, but I certainly have asked
10 the Canadian unions if they'd be ready to sit down and
11 talk to us about post-accident testing.

12 I looked at our data from the Canadian
13 Railway perspective, and I figured four or five
14 accidents a year in Canada totally, and I'm not talking
15 just those parts of the operation that go from the crew
16 location to the border. It would probably have to be
17 -- you know, we'd have to impose testing on the crews
18 in a handful of situations a year. I don't think it
19 would be all that big a deal to do.

20 MS. SUN: You had mentioned the lack of data
21 supporting the need for random testing of Canadian
22 crews in the U.S. Do you have any recent studies on
23 the extent of substance abuse by such crews?

24 MS. ACKERMANS: There are no recent studies

1 in Canada. The last one that we know of was the 1987
2 study that FRA referenced in their Notice and that
3 study, I'm not an expert in it, but from what I recall,
4 it was very flawed, the way that it was done, and the
5 drug people in the audience could perhaps have looked
6 at it in more detail than I have to comment on it.

7 But I would certainly never use that study as
8 a basis for saying that that's the level of drug or
9 alcohol use in Canada.

10 MS. SUN: When you talk about a border zone,
11 does that mean you would see -- CP would be willing to
12 limit its operations within the U.S. to the territory
13 within that border zone?

14 MS. ACKERMANS: What I'm trying to get at is
15 that there are a lot of little differences between our
16 regulations. You know, in Canada, to divert the topic
17 a little bit, we do not require sand under the control
18 of the locomotive engineer. You do in the U.S. So,
19 every unit we send over to Canada that's only been from
20 the U.S. to Canada for the two miles or five miles, it
21 turns around and comes back, we have to have that
22 locomotive compliant with U.S. regulations.

23 Those types of little operating differences
24 are impediments to smooth operations of the trains at

1 the border, and I would suggest that the regulators
2 could sit down and negotiate what they mean by limited
3 distance and how things would operate within those
4 limited distances in terms of, you know, will the U.S.
5 crews coming into Canada be required to do X, Y and Z
6 as opposed to, you know, what they have to do in the
7 U.S.

8 MS. SUN: Does CP have any plans to expand
9 its operations within the U.S.?

10 MS. ACKERMANS: We have no plans to alter the
11 way trains are crewed. So, we would not -- we have no
12 plans to change home terminals, and we would see U.S.
13 crews continuing to come into Canada the way they do
14 today, Canadian crews going into the U.S., for those
15 limited distances that currently exist.

16 MS. SUN: And you mentioned that there are
17 two recent Canadian regulations that affected the
18 operations of U.S. crews in Canada?

19 MS. ACKERMANS: Well, I gave you two
20 examples. I gave them in more detail in the hearing on
21 Tuesday, but the two examples are the medical rules,
22 which, for limited distances, which I guess happens to
23 be the one negotiated, U.S. crews coming into Canada
24 for limited distances do not have to comply with the

1 complete Canadian Medical Rules. That's one example.

2 There's another example that dates from '87.

3 Minimum qualifications for training for such crews.
4 they don't have to completely comply with those minimum
5 qualifications as long as they can demonstrate that
6 they've been certified in the U.S.

7 MS. SUN: Can you also explain what the
8 Safety Management System regulations are?

9 MS. ACKERMANS: I'll try in a nutshell. It
10 is a 12-point regulation which Transport Canada
11 developed over the last couple of years. It became
12 effective at the end of March in 2001, and it requires
13 all railroads operating in Canada to file with
14 Transport Canada a complete picture of our operation,
15 our policies, our procedures, to set performance
16 criteria in terms of accidents and injuries, to do risk
17 assessments whenever there are operational changes
18 contemplated, and Transport has the powers to come in
19 and audit our complete set of documentation and its
20 application in the field.

21 So, it goes well beyond what anything FRA has
22 in the way that FRA manages rail safety. This is very
23 much an ISO-type approach with an audit capability.

24 MS. SUN: And my last question is, do you

1 have any knowledge of current cases that are pending?
2 You talk about litigation costs. Current challenges to
3 drug testing in Canada.

4 MS. ACKERMANS: We don't have current
5 challenges on drug testing. We have other current
6 challenges with the Canadian Human Rights Commission.
7 So, we're well aware of how much any challenge, no
8 matter what it is, costs and that's many thousands of
9 dollars per case and probably between five and 10 years
10 to settle per case.

11 The only -- and I did mention the trucking
12 industry has many human rights cases on the U.S.
13 requirements to test truckers, and I've been told that
14 they intend to issue a policy statement in this Spring,
15 but I'll kind of give them a few months' leeway and
16 figure some time towards the end of the year.

17 MS. SUN: Thank you.

18 MR. COTHEN: Ms. Mocosso?

19 MS. MOCOSO: Thank you.

20 Do you have information regarding the number
21 of affected employees by the proposal?

22 MS. ACKERMANS: It's in my written
23 submission. I have it. I can dig it out for you, but
24 it is in the written submission. We've given the

1 number of employees in the pool, number of employees in
2 the spare boards in each of those locations.

3 MS. MOCOSO: Thank you.

4 And again, you would not expect an increase
5 in those numbers in the future?

6 MS. ACKERMANS: Well, the numbers -- it's
7 interesting that you asked the question. The 1997 data
8 that I quote came from the U.S. website in terms of how
9 many trucks and how many trains, and the number of
10 trains is virtually identical now as it was in '97.

11 So, unless there's a huge modal shift to
12 trains, I would expect that number to, you know, stay
13 more or less the same, maybe grow very slightly, but
14 not to be too much different than what it is today.

15 MS. MOCOSO: Thank you.

16 MR. COTHEN: Mr. Allen?

17 MR. ALLEN: We've got your larger submission
18 here, and we've gone through it to some extent. What
19 jumps out at me, though, as a question is, I think you
20 mentioned this, but I'd like to pursue it a little bit
21 further, is the audit mechanism for all of this to see
22 if it's anything to check the quality of each one of
23 these programs, who audits all of this, and if there is
24 record of those audits that we could possibly have

1 submitted with their findings and also even further
2 than that, for the remedy situation for any findings
3 that there may be.

4 So, if there is any record so that we could
5 -- it would help bolster the actual situation here.

6 MS. ACKERMANS: Transport Canada, as I said,
7 the regulations came into being at the beginning of
8 2001. They commenced their audits starting with VIA as
9 the first of the main carriers, and I guess the plan,
10 the work plan is to audit one of the Class 1s every
11 three years. So, they'll set up a cycle of auditing
12 because it's a fairly large task to go in and audit the
13 complete safety management system.

14 They've designated, I guess, smaller numbers
15 of audits for the smaller carriers, and they've started
16 that process as well. Transport Canada is conducting
17 the audits. They've trained their staff. They have
18 used outside consultants to do that training, and as to
19 whether or not the data will be available, I think
20 that's something FRA and Transport Canada should talk
21 about.

22 Remedies under the Railway Safety Act. If
23 our SMS is found wanting, the Minister has the power to
24 issue orders for us to modify our Safety Management

1 System. Those will be in the public record.

2 The safety inspectors at Transport Canada
3 also have the powers to issue notices and notices and
4 orders to any situation, whether it's found in an audit
5 or whether it's found through regular inspection, if
6 they deem it a situation that needs to be corrected.
7 That's also in the public record.

8 MR. ALLEN: Thank you very much.

9 MR. COTHEN: I might add that our inspectors
10 covet such powers. It's unlikely to happen.

11 Ms. Ackermans, thank you very much for your
12 very comprehensive testimony.

13 MS. ACKERMANS: Thank you.

14 MR. COTHEN: Appreciate it. Just a reminder,
15 that any information that you might have regarding
16 substance abuse testing of the pools or for the extra
17 boards that are involved in the cross-border
18 operations, it would be of interest in terms of the
19 level of and the results thereof.

20 MS. ACKERMANS: I do have a question of
21 clarity for one of the pieces of information you asked
22 of CN and presumably of us about prosecution under the
23 Criminal Code.

24 In addition to drug and alcohol potential

1 prosecutions under the Code, of course, we're going to
2 have arbitration and dismissals that actually don't
3 reach the criminal proceedings. So, I was wondering if
4 you want that included as well, and is this to be
5 confined to, you know, close-to-the-border-type
6 operations or were you just asking in general? I'm not
7 sure I can segregate the data.

8 MR. COTHEN: No, I wouldn't expect you to do
9 that. I mean, we're just asking generally what the
10 practice is, assuming that that overall pattern of
11 compliance would be persuasive to an individual on the
12 entire run.

13 MS. ACKERMANS: And over what time period?
14 How far back do you want us to go?

15 MR. COTHEN: No, I don't want to be
16 excessively burdensome about that. Whatever
17 information you think would be illustrative.

18 MS. ACKERMANS: Whatever we can get easily
19 then, I'll go do the digging.

20 MR. COTHEN: Thanks.

21 Mr. George Hucker, please, Brotherhood of
22 Locomotive Engineers.

23 While Mr. Hucker's coming up, I'll note that
24 of those who have signed in, this would be the final

1 witness today. We will ask for additional witnesses at
2 the end, and we will certainly proceed until we're
3 through, as it appears at this point. So, we'll take
4 lunch afterwards.

5 Statement of George Hucker

6 International Brotherhood of Locomotive Engineers

7 MR. HUCKER: For the record, my name is
8 George Hucker, H-U-C-K-E-R. I won't spell George
9 because there was a couple of Kings of England who were
10 involved in the United States. So, I think you would
11 know how to spell it.

12 Just for clarity purposes, you asked about
13 what the ILO was, and that's the International Labor
14 Organization, and they have a website that you can
15 search in for their conventions, and so it's just for
16 clarity purposes.

17 I also would like to say that I, like my
18 friends from Transport Canada, know how these
19 proceedings are handled because normally, we are the
20 last of the day to make our submissions, and so I hope
21 that they learn something from this experience that
22 should augment us in the labor industry throughout the
23 hearings, also. So, thank you very much for this.

24 I'm the International Vice President and

1 National Legislative Representative for Canada. I
2 handle all regulatory matters in Canada for the railway
3 industry for my union. I deal on a regular basis with
4 Transport Canada, Transportation Safety Board, the
5 Ministry of Finance and the Ministry of Transportation,
6 Mr. Justice.

7 I represent some 5,000 locomotive engineers
8 in Canada who are covered by Canadian laws and
9 regulations and work in passenger, freight, commuter
10 and the yard service.

11 As many of you know, the locomotive engineers
12 has the ultimate responsibility for safe rail
13 operations in Canada, and they are understandably
14 concerned about the efforts of the proposed action of
15 the FRA that will have them and the Canadian railway
16 industry.

17 The Brotherhood believes in a safe and secure
18 railway operation manned by employees who are fit and
19 learned in every way in order to perform their duties
20 in a responsible manner.

21 The emphasis of my brief today will be
22 centered on the Brotherhood's position of
23 extraterritorial imposition of random drug and alcohol
24 testing on the Canadian railway industry through

1 removal of the exemptions contained in the present 49
2 CFR Part 219 for foreign-based -- foreign railways
3 foreign-based operating crews, and we believe that the
4 foreign provisions of the Part 219 have no place in the
5 Canadian railway operational environment.

6 Within the document, Part 2, Section A,
7 Safety-Sensitive Role of Train Employees, at Page
8 64001, Column 3, and at 64002, Column 1, presents the
9 reasons why train service crews in Canada need to be
10 included in the provisions of the operating trains in
11 Canada. I won't go through the quote there, but it's
12 from the Notice.

13 The substantiated position the FRA put
14 forward that the fatigue of working long and varied
15 hours and the failure to sound a horn at a road
16 crossing as contributing factors to unsafe rail
17 operations in Canada. The reality of the Canadian
18 railway operation is that crews are either in present
19 fatigue-reducing management programs developed between
20 the railways and the unions or in design stage of
21 fatigue management programs mandated under the new
22 hours-of-service regulations.

23 Train crews of Canadian National in Western
24 Canada have scheduled pools in which the crews are

1 aware of when they're going to work several months
2 ahead of their scheduled runs. Canadian National,
3 Central and Eastern Regions operate with scheduled
4 trains with assigned crews on most trains.

5 Canadian Pacific is presently in the process
6 of designing fatigue management programs to reduce the
7 levels of fatigue of their operating employees. The
8 results of the trial project in Calgary, Alberta, are
9 being studied with the view of expanding that design to
10 the rest of the railway system.

11 These programs at both railways have been
12 developed from the data and medical evidence gathered
13 from the AAR Work Rest Task Force Study and Report and
14 the Canadian Labor Code Study and Report.

15 Canadian railway labor unions and companies
16 are currently involved in the FRA's NARUP Committee to
17 expand the current comprehension of fatigue and its
18 management upon the North American rail industry.

19 The second quote also exposes the lack of
20 understanding of the reality of the Canadian railway
21 industry and what are required by Canadian laws. Part
22 2 of the Canadian Labor Code mandates and regulates the
23 companies under federal jurisdiction for their senior
24 health and safety committee policy committees,

1 comprising of the senior union officers and company
2 management to oversee the local health and safety
3 committees made up of local representatives in order to
4 ensure a safe work environment is maintained.

5 These committees, from the board rooms to the
6 shop floor, are at hand to oversee the day-to-day
7 company operations and activities. Transport Canada
8 and the Human Resources Development Canada have total
9 oversight responsibility of these committees and their
10 activities and are prepared to intercede where they
11 deem necessary.

12 These health and safety committees, work
13 place committees inspect the work place, coupled with
14 the health and safety committees provide a safe work
15 environment where individuals with a substance abuse
16 problem could be easily identified and placed into
17 company/union-sponsored EFAP programs, a much less
18 draconian approach, we feel, than the random drug and
19 alcohol testing.

20 In the third quote, there's another total
21 lack of understanding of the reality of Canadian
22 railway operations resulting in the Office of Proposed
23 Rulemaking putting forward an unsubstantiated position.
24 Presently, locomotive engineers are generally

1 supervised at the beginning of the tour of duty, prior
2 to leaving the reporting location, during the tour of
3 duty by either company supervisors monitoring the
4 operations or Transport Canada's safety officers riding
5 on trains at random intervals, and upon completion of
6 the trip at the designated terminal.

7 The Canadian Railway Operative, CROA, General
8 Rule A requires that a fellow employee report a crew
9 member that they suspect being under the influence of a
10 substance. With all of the above supervision and
11 controls in place, random testing is not necessary to
12 ensure yet another deterrent to substance abuse.

13 The Railway Safety Act, Section 35, Medical
14 Information, Subsections 1, 2 and 3, state -- that's in
15 regards to the new rules we talked about this morning,
16 and I won't go on to the quote there. You can read it
17 for yourself.

18 When the safety-critical employee's required
19 to take the periodic medical, Section 35.3 requires the
20 safety-critical employee to identify his safety-
21 critical position to the attending physician. Should
22 the attending physician have reasonable grounds to
23 suspect the safety-critical employee has a condition
24 that will affect his or her ability to perform his or

1 her duties, that physician, under Section 35.2, is
2 required to transmit that information to the employer's
3 chief medical officer. Anyone with a substance abuse
4 problem would be identified at that time.

5 Once medical information has been transmitted
6 to the CMO under Subsection 35.4 allows the employer to
7 use that information to ensure the safe railway
8 operations. Should that information lead to a decision
9 of substance abuse, the employee is put into the
10 appropriate company/union program designed to help the
11 employee with his or her problem.

12 Section 41 of the Railway Safety Act on
13 offenses, and it goes all the way to talk about the
14 Criminal Code. I won't quote that.

15 All of the above gives the railway industry
16 and the FRA the results of the FRA's trying to achieve
17 through a new proposed rulemaking which that would
18 violate Canadian laws. The Canadian law already
19 requires the railway industry with the safeguards the
20 FRA believes that they need to initiate through the
21 extraterritorial imposition of U.S. regulations into
22 Canada.

23 At Page 64002, Column 2, the FRA relies on
24 the 1987 survey commissioned by the Canadian Task Force

1 on the Control of Drug and Alcohol Abuse in the Railway
2 Industry. From this report, the FRA has used flawed
3 data to justify the need for the imposition of a
4 draconian rulemaking.

5 The authors of the 1987 report, at Page 23,
6 put forward their conclusions in the report states,
7 "First, interviews which were carried out at time of
8 labor unrest", and I can testify to that because I was
9 the first one in 1987 that was causing the labor
10 unrest.

11 It seems that despite our assurance of
12 confidentiality and the general purpose of research
13 respondents as to the cost, the degree to which that
14 being under the report, under-reporting of the drug and
15 alcohol use, especially on the job, cannot be
16 estimated. However, one must view the results of this
17 study as a minimum measure of what is actually
18 occurring.

19 In the midst of the National Rail Strike, the
20 possibility of back-to-work legislation, the authors
21 realized that the validity of the report must be called
22 into question. The report continues. "It must be
23 pointed out, however, that the urban/rural small city
24 designations were arrived at arbitrarily and may not

1 have been exactly enough to detect the differences by
2 the type of location that may actually exist."

3 Throughout the entire report, the authors
4 made arbitrary assumptions and conclusions on the
5 number of actual individuals who have substance abuse
6 problems. They have extrapolated their findings into
7 massive drug problems in the railway industry, figures
8 that are greater than those found in the overall
9 general Canadian population.

10 I may state here that the average age of a
11 locomotive engineer in the Canadian railway industry is
12 about 47 years old. The FRA has ran into this out-of-
13 date survey based on questionable assumptions and
14 conclusions, the basis of their self-serving
15 conclusions that rampant drug and alcohol abuse in the
16 Canadian railway industry that only can be solved by
17 their draconian rules that we are here to comment on.

18 The FRA rulemaking at Page 64002, Column 3,
19 uses an arbitration award between CNR and the CAW as
20 more proof of the widespread drug and alcohol abuse in
21 the Canadian railway industry, and at Page 64002,
22 Column 3 and 4, the FRA states -- I won't quote it, but
23 I'll go on to Page -- with Arbitrator Burkette at Page
24 7 of my submission.

1 If you go through and read his -- my quotes
2 here, you will note through the Pages 7 and 8 and to
3 the top of Page 9, where he talks in regards to the
4 differences between the two regulatory regimes in
5 Canada and the United States and what the different
6 Acts are put forward, plus what's contained in the
7 Railway Safety Act.

8 I'll begin at the halfway down at Page 9
9 again. The FRA, when dealing with a sensitive subject
10 that has been identified in the above quotes at Page
11 64003, Column 1, states in the 1991 Omnibus
12 Transportation and Employee Testing Act, 6. Added
13 safeguards can be implemented to ensure that the
14 testing of the abuse of alcohol and the use of illegal
15 drugs is performed in a manner that protects an
16 individual's right to privacy, ensure that no
17 individual is harassed by being treated differently
18 from other individuals and to ensure that no
19 individual's reputation or career development is unduly
20 threatened or harmed.

21 While the Omnibus Act may allow for some sort
22 of privacy safeguards to be put in place to protect the
23 individual's privacy, the rights -- the Charter of
24 Rights at Section 8 already provides the fundamental

1 right to privacy. Arbitrator Burkette, in his 1999
2 arbitration award, used Section 8 of the Charter of
3 Rights and Freedoms and stated, "The right to one's
4 privacy is a right of protection from unwarranted
5 intrusion into another's life."

6 The underlying premise is that in a
7 democratic society, an individual is free to live his
8 or her life as he or she pleases without interference
9 and monitoring, so long as there's no adverse impact
10 upon another or breach of law.

11 The Canadian accepts this as a right to
12 privacy is traced through legislation in international
13 and constitutional law, scholarly writings, and
14 judicial statements. The conclusion there is that
15 privacy is protected under Section 8 of the Charter is
16 an essential value in the Canadian industry.

17 This case falls in the Imperial Oil case
18 before the Ontario Human Rights Tribunal and the
19 Federal Court's ruling in the Dominion Bank case, both
20 on random drug and alcohol testing.

21 Where it is necessary to protect the railway
22 ship, the Brotherhood of Locomotive Engineers would
23 choose the Charter of Rights in favor of the Omnibus
24 Act.

1 At Page 64005, Column 3, the FRA in part
2 states, "Because of the existing of the level of cross-
3 border operations involving FRFB train crews, the
4 potential increase in such operations and the increased
5 risk," when reading the quote, one is left with the
6 impression that there are thousands of miles of track
7 involved, that major cities are at risk by the number
8 of -- great number of employees involved and the drug
9 and alcohol abuse.

10 When looking at the actual infrastructure and
11 the number of employees involved, the facts show the
12 data concerned, approximately 200 miles of track at 15
13 border locations. However, when the proposed rule is
14 examined under the cold hard light, it will dictate
15 thousands of employees be required to be involved in
16 random testing pool.

17 For example, CP Winnipeg Locomotive Engineers
18 man southbound trains from Emerson -- to Emerson,
19 Manitoba, and into the U.S. at Noyes, North Dakota, a
20 distance of two miles. The Winnipeg terminal runs
21 trains on the westbound mainline, the northbound
22 mainline, and a southwest branch pool.

23 For these approximately two miles and
24 approximately 10 employees, CPR would be required to

1 place a hundred locomotive engineers and 200 conductors
2 and trainmen into a random drug and alcohol testing due
3 to the possibility of any of these employees manning
4 the west, north and branch pools being used on the
5 southbound train to Emerson.

6 For a review of the entire situation, we've
7 attached Appendix A and B showing both locations and
8 the trackage involved.

9 Given the entire situation, the FRA is not
10 certain as to what exactly they want or what is needed,
11 and at Page 64007, Column 2, the FRA states, "In this
12 portion of the Preamble, the FRA solicits comments on
13 whether to broaden the application of the other Part
14 219 requirements to reach operations and employees
15 outside the U.S.

16 For example, the FRA invites comments on
17 whether it should expand the basis of requiring post-
18 accident testing under Subpart C and the testing for
19 cause under Subpart B to events that occur outside of
20 the United States and, if so, what those events should
21 include."

22 Currently under Part 219, the FRA limits the
23 qualification events to post-accident and for cause
24 testing to those within the United -- borders of the

1 United States. These testing requirements are already
2 in place in the Canadian system. If, indeed, there is
3 such a need, why not have the parties meet in order to
4 openly discuss and attempt to satisfy and resolve the
5 issue instead of setting parameters for a court battle
6 over a non-issue from the Brotherhood's point of view?

7 With all due respect to the proposed
8 legislation presented by the FRA, the Brotherhood can
9 find no evidence that these changes will either improve
10 upon or add to the laws currently in place in Canada.
11 We strongly feel that the legislation as it exists
12 fulfills the purpose of the extent of both our
13 Governments; that is, optimum safety of the public and
14 our employees.

15 Once again, I thank you for this opportunity
16 to put our submission before you. Appendix A and B
17 show the locations that we thought for cross-border
18 operations out of Canada.

19 MR. COTHEN: Thank you, Mr. Hucker.

20 Questions from the Panel?

21 (No response)

22 MR. COTHEN: I guess you'll get off lucky.
23 Thank you very much for your testimony.

24 MR. HUCKER: Thank you.

1 MR. COTHEN: Are there any other witnesses
2 for today's hearing?

3 (No response)

4 MR. COTHEN: Hearing and seeing none, let me
5 just close, if I could, by expressing the personal
6 sense of unease, I think, that we have as colleagues in
7 needing to address this issue.

8 I think we remarked at the beginning of the
9 effort that this is an issue on both of our
10 international borders potentially. The discussion has
11 centered around our northern border today because
12 that's where the comments have come from and it's where
13 the current operations exist, and I think that if
14 someone were to attend this hearing only and have no
15 other knowledge of the relationships between the United
16 States and Canada with regard to transportation safety
17 and railway safety in particular, one would derive a
18 greatly-distorted view.

19 We work across a broad breadth of issues
20 cooperatively and normally with a very significant
21 degree of agreement on the issues and questions. We
22 both have -- both of our Governments, and I'm sure the
23 Mexican Government as well, have an interest in
24 achieving that highest level of safety practicable for

1 our employees and for the public protected by the
2 operations, and we also have a desire to achieve the
3 greatest degree of reciprocity and harmonization in our
4 standards.

5 The issues here with respect to this very
6 narrow topic really just come down to how do we resolve
7 those criteria in this particular application. So, I
8 hope that all in attendance will understand that we
9 come to the topic not in an atmosphere, hopefully, of
10 conflict but with a desire to achieve a resolution of
11 the question which has occurred over the years, and
12 with that, will you allow us one minute off the record,
13 so we can determine when we're going to ask for your
14 written follow-up filings?

15 (Discussion off the record.)

16 MR. COTHEN: Back on the record.

17 The FRA has, as you all know who've been in
18 town this week, two different proceedings involving
19 cross-border issues going. In the other proceeding,
20 the request was made to do any post-hearing submissions
21 by the 21st of the month, and the parties in this
22 proceeding have referenced the other proceeding.

23 So, I suppose it would be optimum from the
24 point of view of moving briskly on both if we made it

1 the 21st of the month. Is there anyone who would have
2 difficulty doing that?

3 MS. ACKERMANS: Can I suggest maybe that --
4 because I'm not sure what you're expecting from us as
5 opposed to CN. Could you actually send us a list of
6 the questions for clarity, so we don't answer the wrong
7 questions?

8 Some of this data is complicated and was
9 asked for at other hearings. I think we need a bit
10 more time.

11 MS. SUN: How much time do you think you
12 need?

13 MS. ACKERMANS: A month? Three weeks? A
14 month?

15 MR. COTHEN: Okay. Let's write down -- the
16 parties will write down with some specificity the
17 questions. We would ask you to do what you can to
18 address them in a much shorter period, and the last
19 date on which we will guarantee consideration of
20 comments would be, let's say, the 14th of March.

21 As I say, if you're able to do that earlier,
22 please do.

23 Are there any other statements or requests
24 before we adjourn?

1 (No response)

2 MR. COTHEN: All right. Thank you very much
3 for your attendance and testimony.

4 (Whereupon, at 11:50 a.m., the hearing was
5 concluded.)

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